91-72

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES M. SPEARS
General Counsel

JAY C. SHAFFER
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

LESLIE RICE MELMAN
Attorney

MICHAEL E. ANTALICS
ANN MALESTER
Assistant Directors
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether private horizontal price-fixing is "actively supervised" by the State (for purposes of implied exemption from the federal antitrust laws) where prices are filed with a state agency but state officials do not determine whether the prices meet the State's regulatory criteria.

2. Whether the court of appeals properly deferred to the Federal Trade Commission's findings of fact.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Chicago Title Insurance Company, SAFECO Title Insurance Company (now operating under the name Security Union Title Insurance Company), Lawyers Title Insurance Corporation, and Stewart Title Guarantee Company were respondents before the Federal Trade Commission and petitioners in the court of appeals. First American Title Insurance Company was a respondent before the Commission; it settled the charges against it by consent agreement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 922 F.2d 1122. The opinion and final order of the Federal Trade Commission (App., *infra*, 41a-136a), and the initial decision of the administrative law judge (App., *infra*, 137a-250a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1991. A petition for rehearing was denied on

March 12, 1991. App., *infra,* 39a-40a. On June 2, 1991, Justice Souter extended the time for filing a petition for certiorari to and including July 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Section 5(c) of the FTC Act, 15 U.S.C. 45(c), provides, in pertinent part:

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

STATEMENT

This case concerns horizontal price-fixing by five large title insurance companies. The ultimate issue in this case is the meaning of the requirement of "active state supervision" in the context of the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

Respondents insure buyers of real property against losses due to certain defects in title. Respondents charge their customers a relatively small fee for assuming the risk of such losses, and a relatively large fee for conducting a title search and examination. A title search is a compilation, in chronological order, of publicly recorded instruments in the chain of title. A title examination is an evaluation of the legal significance of those instruments. App., *infra*, 147a-180a.

Beginning in the 1960s, respondents organized "rating bureaus" in a number of States to fix prices for title search and examination services. App., *infra*, 4a, 217a. The rating bureaus agreed on uniform rate schedules that were filed with state insurance departments. Under the States' insurance laws, respondents' rates were effective unless disapproved by state insurance officials. Although respondents' rates were not disapproved, there was no hearing, written decision, or other evidence that state officials had determined that the rates were consistent with the States' regulatory policies. The question in this case is whether respondents' price-fixing nevertheless met the legal criterion of being "actively supervised" by the States, and therefore is exempt from the federal antitrust laws, under the state action doctrine of *Parker* v. *Brown, supra,* and subsequent decisions of this Court.

1. In January 1985, the Federal Trade Commission issued an administrative complaint alleging that respondents had violated Section 5 of the FTC Act, 15 U.S.C. 45, by collectively setting rates for title search and examination services. The complaint listed 13 States as "[e]xamples of states in which one or more of the Respondents have fixed prices." App., *infra*, 45a (quoting Compl. para. 11). In their answer, respondents argued, among other things, that their price-fixing took place pursuant to clearly articulated state policies, and was

actively supervised by the States at issue. Consequently, respondents argued, their price-fixing was exempt from the antitrust laws under the state action doctrine.

In December 1986, the administrative law judge issued a decision concluding that respondents' activities, which plainly violated the FTC Act unless they were exempt from the federal antitrust laws, were exempt from those laws under the state action doctrine in some States, but not in others. App., *infra*, 137a-250a.

2. In September 1989, the Commission issued a final order and opinion prohibiting the companies from collectively setting prices for title search and examination services except "where such collective activity is engaged in pursuant to a clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body." App., *infra*, 42a. The Commission observed that the state action exemption applies only where state officals "have and exercise the power to review particular anticompetitive acts." *Id.* at 53a (quoting *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988)). Thus, the Commission concluded that "[n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance or non-substantive review of rate filings." App., *infra,* 55a (quoting *New England Motor Rate Carriers*, No. 91-70 (F.T.C. Aug. 18, 1989) slip op. 15. Moreover, the Commission concluded, it is not sufficient that "the state statute * * * provides some mechanism for oversight." App., *infra*, 53a. Because "[t]he mere presence of some state involvement or monitoring does not suffice," 486 U.S. at 101, "isolated instances of review" by state officials will not shield unreviewed private activity from the antitrust laws. App., *infra*, 54a. Accordingly, the Commission "h[e]ld that the active supervision requirement is satisfied only where the

state agency has acted affirmatively to review and approve the proposed tariff or rate." *Id.* at 55a.[1]

a. As to Wisconsin, the Commission adopted the ALJ's findings that "no hearing has ever been held * * * on *any* insurance rate filing" and that the State "followed a hands-off policy in dealing with title insurers." App., *infra*, 60a. The Commission noted that respondents' 1971 rate filing remained in effect for years, even though the supporting data needed to determine whether the rates met the State's regulatory criteria were not even filed with the State until 1978. *Id.* at 60a-61a. The Commission agreed with the ALJ's finding that respondents' 1981 filing, which raised rates by 11%, was "allowed to go into effect (i.e., not disapproved)" after state officials checked only the mathematical accuracy of the filing. *Id.* at 199a. Moreover, the 1982 filing was given "a cursory reading to the point that the supporting materials (statistical data and a pro forma analysis) were not even checked for accuracy." *Ibid.* In addition, "nearly two dozen endorsements and amendments went into effect without being examined by all." *Id.* at 63a.

b. As to Montana, the Commission found that "the record demonstrates that rates from the 1983 filing went

---

[1] As discussed below, the Commission ultimately held that respondents' activities were not actively supervised in four States—Arizona, Connecticut, Montana, and Wisconsin. This petition focuses on respondents' activities in Wisconsin and Montana. These two examples are sufficient to frame the central legal issue presented by this case. In addition, the court's application of its "basic level of activity" test to those two States is particularly troubling, because the court did not suggest that officials in those states determined that respondents' price-fixing was consistent with state policy. We also submit however, for the reasons set out below, see pages 19-20, *infra*, that the court of appeals' decision—in particular, its holdings as to Connecticut and Arizona—does not accord sufficient deference to the Commission's findings of fact.

into effect without being examined." App., *infra*, 76a. The Commission observed that a rating bureau representative met with state insurance officials and was told that, although the increase would go into effect immediately, additional supporting data would have to be filed with the insurance department. *Id.* at 74a. Respondents never provided the required supporting data. *Ibid.* The Commission rejected the argument that the active supervision requirement was satisfied by hearings, "held three years before the formation of the rating bureau," concerning "restrictive legislation designed to keep * * * attorneys, real estate brokers, and lending institutions * * * out of the title insurance business." *Id.* at 75a. The Commission agreed with complaint counsel that "such hearings cannot substitute for supervision of the price-fixing in question." *Id.* at 75a-76a. Similarly, the Commission concluded that the Montana legislature's enactment of legislation *after* respondents' price-fixing does not constitute active supervision. "Otherwise," the Commision observed, "states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated a federal statute. *Id.* at 76a.[2]

3. The court of appeals reversed. App., *infra,* 1a-38a. The court noted that respondents "do[] not dispute the FTC's holding that the horizontal price-fixing agreements among five of the nation's largest title insurance companies * * * were anticompetitive and unfair within the meaning of § 5 of the FTC Act." *Id.* at 2a. But the court

[2] The Commission also rejected respondents' arguments that title search and examination services are part of the "business of insurance," and therefore exempt from Commission review under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), App., *infra*, 78a-99a, and that respondents' price-fixing was protected under the *Noerr-Pennington* doctrine, *id.* at 99a-105a.

held that respondents' price-fixing activities were exempt from the antitrust laws under the state action doctrine.[3]

The court of appeals recognized that "[i]n the aftermath of *Patrick*, it is clear that the active supervision test requires that the state 'have and exercise' the power to review the particular anticompetitive acts." App., *infra*, 27a. The court noted that this Court has considered four factors in determining whether the active supervision requirement is met: "(1) whether the state establishes the rates; (2) whether the state reviews the reasonableness of the rates; (3) whether the state monitors market conditions; and (4) whether the state ha[s] engaged in any 'pointed reexamination' of its program." *Ibid.* (citing *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 345 (1987); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)). The court of appeals quoted language from the First Circuit's decision in *New England Motor Rate Bureau, Inc.* v. *FTC*, 908 F.2d 1064 (1990) (*NEMRB*), as "most instructive on what type of showing is necessary to satisfy *Midcal*'s active supervision prong." App., *infra*, 27a. The court declared (*id.* at 28a (quoting *NEMRB*, 908 F.2d at 1071)):

> Where * * * the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry

[3] The court did not reach respondents' additional arguments that their price-fixing was protected under the McCarran-Ferguson Act and the *Noerr-Pennington* doctrine. App., *infra*, 38a n.17. In addition, the court refused to consider respondents' separation of powers argument. *Ibid.*

out the state's policy and not simply their own policy, more need not be established.

The court of appeals agreed with the Commission that there was no evidence in the record that any of the States at issued monitored market conditions or engaged in a pointed reexamination of their program. But the court concluded that the States at issue nevertheless satisfied the test quoted above. Although the court of appeals did not elaborate on the amount or type of official activity necessary to satisfy its "basic level of activity" test, the court concluded that Wisconsin and Montana had satisfied the test even though it did not find that state officials had determined that the particular rates prescribed by the rate agreements at issue were consistent with the State's policies.

The court held that Wisconsin actively supervised respondents' price-fixing. The court concluded that state officials had the power to regulate respondents' rates, because state law "required Wisconsin's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate, or unfairly discriminatory," and "to reject rates following a hearing if they do not meet the statutory criteria." App., *infra*, 36a (citing Wis. Stat. Ann. §§ 625.11(1), 625.22 (West 1980)). The court of appeals also concluded that Wisconsin had exercised the power to supervise respondents' price-fixing. The court observed that "Wisconsin's program of supervision was in place during the relevant time and * * * was staffed and funded." App., *infra*, 36a. Moreover, the court said, Wisconsin officials had "ample power and the duty to regulate pursuant to declared standards of state policy," and the duty was enforceable through mandamus proceedings in the state courts. *Ibid.* Finally, the court concluded, Wisconsin officials "demonstrated some basic level of activity directed towards seeing that [respondents] carried out the state's policy." *Id.* at 36a-37a. The court noted that "Wisconsin's Insurance Department raised questions regarding the 1971 filing and later ruled it was acceptable. The Insurance Department checked the 1981 filing for accuracy. The 1982 filing also received some review from the Insurance Department." *Id.* at 37a.

As to Montana, the court of appeals concluded that state officials were required to make sure that all rate bureau filings complied with state statutory requirements, and to reject any rates that did not meet the statutory criteria. App., *infra*, 34a (citing Mont. Code Ann. §§ 33-1-311, 33-16-201, 33-16-204 to 33-16-206, 33-16-211 (1989)). The court said that Montana's program of supervision was in place, staffed, and funded, and that an action for a writ of mandamus was available in the Montana courts to compel the insurance officials to determine whether a particular rate met the State's statutory criteria. App., *infra*, 35a. Finally, the court concluded that state officials in Montana had engaged in "some basic level of activity" directed towards assuring compliance with the State's regulatory policies. *Ibid.* The court observed that "someone from Ticor's rating bureau met with officials of Montana's Insurance Department. The state officials told Ticor's representative that the increase would go into effect immediately and approved the filing. However, the state officials requested additional supporting data." *Ibid.* (citations omitted). The court noted, however, that "[t]here was no evidence that [respondents] ever supplied this supporting data." *Id.* at 35a n.16. The court of appeals nevertheless concluded that "the quantity of Montana's actions [was] sufficient to allow [respondents] to invoke the state action doctrine." *Id.* at 35a.

The Commission's petition for rehearing was denied, over three dissents. App., *infra*, 39a-40a.

REASONS FOR GRANTING THE PETITION

In this case a major multi-state investigation and enforcement proceeding by the Federal Trade Commission has been effectively nullified by a federal court of appeals through adoption of a recently minted legal standard that critically weakens the test this Court has devised to bring private anticompetitive conduct within the implied exemption from the antitrust laws established by *Parker* v. *Brown*, 317 U.S. 341 (1943). The court of appeals' decision represents a dramatic expansion of judicially created immunity from the federal antitrust laws. The holding, in practical effect, permits private parties to engage in horizontal price-fixing free from either federal antitrust scrutiny or state supervision.

The court's decision significantly redefines and vitiates the carefully constructed "active supervision" requirement laid down by this Court in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and applied in subsequent cases. The court of appeals' watered-down version of "active supervision"—which requires only that a state agency with authority to regulate be staffed, funded, and engaged in "some basic level of activity"—cannot be reconciled with this Court's firm insistence that the state action doctrine exempts only those "particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988). Where, as here, the State has not determined whether particular prices fixed by competitors are consistent with State policy, "there is a real danger" that private parties are acting only "to further [their] own interests rather than the governmental interests of the State" reflected in a state regulatory program that suffices to protect the public interest in lieu of the antitrust laws. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 47 (1985).

In addition to creating a category of private anticompetitive activity that is neither supervised by state officials nor subject to the federal antitrust laws, the court of appeals' vague and lax formulation of the "active supervision" requirement will generate uncertainty among businesses, consumers, and regulators. In place of the relatively clear requirement that private conduct is subject to the federal antitrust laws unless state officials actually determine that the conduct comports with the State's regulatory policies, the court of appeals has substituted a standardless "basic level of activity" test. Moreover, the court of appeals' test invites an intrusive inquiry into state administrative processes that is inconsistent with the principles of federalism that underlie the state action doctrine.

The court of appeals' decision—most particularly the legal standard it adopted and applied—will have a substantial adverse effect on the Commission's enforcement program. Because the FTC Act permits any entity carrying on business in the Third Circuit to seek review of a Commission cease-and-desist order in that circuit, see 15 U.S.C. 45(c), the Commission is unlikely to have the opportunity to challenge the "basic level of activity" test in other circuits in future nationwide enforcement proceedings. Indeed, in this very case the States under discussion—Wisconsin, Montana, Arizona, and Connecticut—are all located outside the Third Circuit. The Third Circuit's decision will also affect antitrust enforcement by the Antitrust Division of the Department of Justice, as well as private antitrust actions. This Court should grant certiorari to make clear that the "active supervision" prong of the state action exemption requires a showing that the

State "has acted affirmatively to review and approve" challenged private conduct. App., *infra*, 55a.

1. In *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court held that the Sherman Act did not invalidate a California statute that authorized a state commission to impose price-enhancing restrictions on private raisin producers. Essential to the Court's decision in *Parker* was the fact that "it is the state, acting through the [state] Commission, which adopts the program." *Id.* at 352. The Court observed that "a state does not give immunity to [private parties] who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citing *Northern Securities Co.* v. *United States*, 193 U.S. 197, 332, 334-347 (1904)).

In *Midcal*, the Court expressly held that the state action exemption of *Parker* v. *Brown* does not apply unless the challenged restraint is not only "clearly articulated and affirmatively expressed as state policy," but also "'actively supervised' by the State itself." 445 U.S. at 105 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). In *Midcal*, the Court concluded that, where the State does not establish prices, review the reasonableness of prices, monitor market conditions, or engage in any "pointed reexamination" of the program, a "gauzy cloak of state involvement" is not sufficient to confer antitrust immunity on private anticompetitive conduct.[4] 445 U.S. at 106.

[4] In *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48 (1985), which concerned collective ratemaking by motor carriers, the Court noted that, under the regulatory scheme there at issue, "[a] proposed rate becomes effective if the state agency takes no action within a specified period of time," and that the state agencies "have and exercise ultimate authority and control over all intrastate rates." *Id.* at 50-51. In that case, unlike this one, the government conceded that the state agencies actively supervised the private activity. *Id.* at 62. Accordingly, only application of the "clear articulation" prong of the *Midcal* test was at issue in this Court. *Ibid.* Indeed, the state agencies involved in the motor carriers case did in fact "consistently require hearings." *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 476 (N.D. Ga. 1979).

The "active supervision" requirement is fundamental to proper confinement of the scope of the implied exemption recognized in *Parker* v. *Brown*. That exemption is based on reluctance to assume that the federal statutes broadly prohibiting anticompetitive commercial practices, even though comprehensively drafted, were meant to prohibit acts of the States themselves. Cf. *Gregory* v. *Ashcroft*, No. 90-50 (June 20, 1991). But that judicially implied exemption cannot properly be extended to allow the States merely to immunize private conduct from prohibitions enacted by Congress. It is not the province of the States to repeal the federal antitrust laws, industry by industry, and substitute authorization of privately imposed trade restraints.

This Court, therefore, has consistently adhered to the rigorous "active supervision" requirement in decisions applying the state action exemption. In *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987), the Court held that state monitoring that fails to exert "significant control" over anticompetitive conduct does not constitute active supervision. *Id.* at 345 n.7. Most recently, in *Patrick* v. *Burget*, 486 U.S. 94 (1988), the Court explained that the active supervision requirement can be met "only if the State effectively has made [the challenged private] conduct its own." *Id.* at 106. The Court added that the active supervision requirement

> is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of

> private parties that, in the judgment of the State, actually further state regulatory policies. * * * The mere presence of some state involvement or monitoring does not suffice. * * * The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

Id. at 100-101. Accordingly, forms of "state involvement or monitoring" that do not " 'exert[] any significant control over' the terms of the restraint" are not sufficient to warrant displacement of national economic policy. *Patrick*, 486 U.S. at 101 (quoting *324 Liquor*, 479 U.S. at 345 n.7). See generally Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 695-696 (1991).

2. The court of appeals' decision in this case reduces the "active supervision" requirement to an empty formality. The court's novel standard is not only toothless; it cannot be reconciled with this Court's holdings that private anticompetitive activity does not qualify for the state action exemption unless state officials have made a judgment that the particular private conduct at issue furthers, or at least is consistent with, the State's policies. See *California Retail Liquor Dealers* v. *Midcal, supra*; *Patrick* v. *Burget, supra*; *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976) (state agency's passive acceptance of tariff does not confer state action immunity). In this case, state officials engaged in "some basic level of activity"—by accepting submissions for filing, sometimes checking them for accuracy, and occasionally requesting additional data—without determining whether the particular private price-fixing met the State's regulatory criteria. The court of appeals' unfocused inquiry into the activity level of state officials does not suffice as a basis for conferring an implied exemption from antitrust prohibitions. As leading

commentators have noted, the essential inquiry is "whether the *operative decisions* about the challenged conduct [were] made by public authorities or by private parties themselves." 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213b, at 73 (1978) (emphasis added).

In this case, it is clear that respondents—not state officials—made the operative decisions. Respondents fixed prices through their private rating bureaus. Respondents then filed their rates with state insurance departments. The Commission found (and the court of appeals did not purport to reject its findings) that no state official determined that respondents' rates were consistent with the State's regulatory criteria. See App., *infra*, 61a, 74a. Thus, respondents' rates remained in effect only because state officials took no steps to disapprove them.[5]

In Wisconsin, for example, the court of appeals relied on the Commission's findings that state officials "checked the 1981 filing for accuracy" and that the 1982 filing "also received some review." App., *infra*, 37a. That is not a sufficient factual basis for the court of appeals' conclusion that "Wisconsin satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors." *Ibid.* As to the first factor, the court of appeals' conclusion that the State "established the rates" is simply untrue. Respondents, not the State, established the collective rates through their rating bureau.

[5] Although the Third Circuit purported to follow the First Circuit's decision in *New England Motor Rate Bureau, Inc.* v. *FTC* (*NEMRB*), *supra*, in fact the Third Circuit's decision goes considerably further than the First Circuit's decision in *NEMRB*. In *NEMRB*, the First Circuit concluded, on the basis of the parties' stipulations, that "the failure to suspend or reject a rate indicate[d] a determination that the rate has been found to meet the [substantive] regulatory criteria of the statute" and that "unreasonable rates [are] rejected" by state regulators. 908 F.2d at 1077. Here, in contrast, there were no such stipulations or findings.

Although the State *could* have established the rates itself (by holding a hearing and issuing an order) it did not do so. Nor did the State review the reasonableness of the rates established by respondents. Reviewing a filing for accuracy is not the same as reviewing the reasonableness of the rates; a filing may be both accurate and unreasonable.

In Montana, state officials told respondents' representative that the collective rates would go into effect immediately, but that respondents would be required to submit additional supporting data. Respondents never supplied that information. It is formalism in the extreme to suggest, based on this record, that Montana somehow established the rates and reviewed the reasonableness of the rates. Indeed, the officials' unfulfilled request for additional data is itself a smoking gun; it powerfully indicates that state officials never determined that the rates were consistent with state policies.

In sum, Wisconsin and Montana made *no* judgment that respondents' price-fixing furthered state policy. As Professors Areeda and Turner explain, where "[t]ariff provisions * * * take effect unless the [state] agency takes affirmative steps to suspend or disapprove them, * * * [a]gency inaction is not sufficient to justify immunity." 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213f, at 77-78 (1978).

3. a The court of appeals concluded that officials in both Wisconsin and Montana are required by state law "to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate, or unfairly discriminatory" and to "reject any rates if they did not meet the statutory criteria." App., *infra*, 34a, 36a. Even if the court of appeals were correct on this point, we think respondents' price-fixing would violate the federal antitrust laws, because the States did not in fact determine that respondents' price-fixing met the States'

regulatory criteria. But, in any event, the court of appeals was incorrect in suggesting that state law imposes on officials in Wisconsin and Montana a mandatory duty to review every filed rate and to reject all rates that do not meet the State's criteria. On the contrary, insurance officials in both States have discretion to review, or not review, particular rate filings.[6] Where state officials have such discretion, their failure to act to disapprove a particular filed rate does not warrant a presumption that state officials have made an affirmative determination that the rate is in accord with state policy. On the contrary, inaction by state officials in the context of such a regulatory regime generally indicates nothing more than that the State has elected to allocate its resources to other matters. That falls far short of an actual determination that the rates are consistent with the state's regulatory criteria. See 1 P. Areeda & D. Turner, *supra*, ¶ 213f, at 78.[7]

---

[6] The provisions of state law cited by the court of appeals do not support its statements that state officials are required to determine whether every filed rate is consistent with the State's criteria. See Wis. Stat. Ann. § 625.11(1) (West 1980) ("Rates shall not be excessive, inadequate or unfairly discriminatory."); *id.* § 625.13 (insurers shall file all rates "within 30 days after they become effective"); *id.* § 625.22 ("If the commissioner finds after a hearing that a rate is not in compliance with § 625.11, the commissioner shall order that its use be discontinued"); Mont. Code Ann. § 33-1-311 (1989) ("The commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code."); *id.* § 33-16-201 ("Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.").

[7] In a "somewhat similar," although "by no means identical," context, *National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179, 194 n.14 (1988), the Court has rejected the argument that "inaction" or "mere acquiescence" by the State converts private action into state action. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 354-355 (1974) (termination rules included in utility company's tariff,

b. In *Patrick*, this Court reserved the question "whether judicial review of private conduct ever can constitute active supervision." 486 U.S. at 104. The court of appeals' decision in this case rests in part on its conclusion that, in each State at issue, private parties have a right to seek a writ of mandamus from a state court to compel state officials to determine whether a particular filed rate meets the State's regulatory standards. The court of appeals' erred in relying on this hypothesized remedy. In this case, as in *Patrick*, the judicial review available to consumers, if it "exists at all, falls far short of satisfying the active supervision requirements." *Ibid.* As noted above, state officials in each State at issue have discretion to decide whether to review particular rate filings to determine whether they meet the state's regulatory criteria. Mandamus is an extraordinary remedy, issued only in the discretion of the court and is, in any event, not available to compel state officials to exercise their discretion in a particular way. See, *e.g.*, *Jeppeson* v. *State Dep't of State Lands*, 205 Mont. 282, 667 P.2d 428 (1983); *Vretenar* v. *Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714, 716 (1988) (mandamus not appropriate "when the officer's duty is not clear and requires the exercise of judgment and discretion"). Accordingly, it cannot here afford the type of judicial review that arguably might satisfy the "active supervision" requirement.

More generally, we think the "active supervision" requirement is not satisfied by the mere availability of a possible judicial remedy. Judicial review is a costly and time-consuming process. At best, a requirement that consumers resort to an action in state court will impose significant delays during which private parties may engage in anticompetitive behavior that ultimately is determined not to be consistent with the State's policies. At worst,

---

but not considered in hearings on rate increases, are not state action for purposes of 42 U.S.C. 1983). See also *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 164 (1978).

consumers will not avail themselves of judicial review even where it is available. That is particularly true where, as here, the benefits of a successful lawsuit will be shared by many consumers, but the costs are likely to be borne by the few consumers who seek judicial review. In short, a State does not "actively supervise" private anticompetitive activity by shifting to consumers the burden of monitoring the marketplace and bringing an action in state court to enforce compliance with state standards. See generally Elhauge, *supra*, 104 Harv. L. Rev. at 712-717.

4. In describing the court of appeals' departure from this Court's standard for active state supervision—under which the antitrust exemption for state action applies "only if the State effectively had made [the anticompetitive private] conduct its own," *Patrick* v. *Burget*, 486 U.S. at 106—this petition has focused on respondents' activities in Wisconsin and Montana. In addition, however, the court of appeals reversed the Commission's determinations that respondents' price-fixing in Arizona and Connecticut was not actively supervised by state officials. In so doing, the court disregarded the established rule that the Commission's findings are conclusive if supported by substantial evidence, see 15 U.S.C. 45(c); *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), and the corollary rule that, in reviewing Commission decisions, courts may not "make [their] own appraisal of the [evidence], picking and choosing for [themselves] among uncertain and conflicting inferences," 476 U.S. at 454. In particular, the court of appeals relied on testimony by an Arizona official that "every filing submitted from 1972 to 1983 'was examined to see if it met the statutory requirements. It was scrutinized and it was either approved or disapproved.' " App., *infra*, 31a. Similarly, the court of appeals relied on testimony by a Connecticut official that "the state's Insurance Department 'reviews every filing that we receive.' " *Id.* at 33a.

In relying on these isolated bits of testimony, the court of appeals failed to recognize that the Commission considered the entire record in this case—making credibility determinations and resolving conflicting evidence—and arrived at a different appraisal of the facts. In Arizona, for example, the Commission found that there was "no convincing evidence that [respondents' 1968 rate filing] was * * * reviewed by the state." App., *infra*, 68a, 70a. Moreover, the Commission found that "in Arizona title insurance rates become effective 15 days after they are filed if the insurance department takes no action—they are 'deemed' to meet the requirements of the statute. The 1968 filing was allowed to become effective in this manner." *Id.* at 69a. As to Connecticut, the court of appeals ignored the Commission's finding that "state officials had readily identified aspects of collective ratemaking that they themselves considered crucial but which were not being supervised at all," *id.* at 56a, and its additional finding that numerous endorsements and amendments filed by respondents without any supporting data were not reviewed by state officials, *id.* at 58a, 60a.

Although the court's refusal to accept the Commission's appraisal of the evidence, standing alone, might not warrant certiorari, we think further review of that issue is warranted in the context of this case, which also presents the general question of the proper legal standard for applying the active supervision requirement to a regime of filed rates. If this Court determines, as we submit, that the court of appeals applied an incorrect legal standard, it could, of course, remand the case to the court of appeals for application of the correct standard by that court to Arizona and Connecticut.

5. This case concerns horizontal price-fixing. No antitrust offense is more "dangerous to society." *FTC* v. *Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 781 n.16 (1990) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1509, at 412 (1986)). Indeed, the price-fixing at issue here is even more dangerous than ordinary price-fixing, because the state agency provides a mechanism for monitoring and enforcing competitors' participation in the cartel. The court of appeals' decision thus threatens to abrogate the protections of the federal antitrust laws—and to leave consumers substantially unprotected—in a wide variety of industries, professions, and occupations that are nominally subject to state regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES F. RILL
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

JAMES M. SPEARS
General Counsel

JAY C. SHAFFER
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

LESLIE RICE MELMAN
Attorney

MICHAEL E. ANTALICS
ANN MALESTER
Assistant Directors
Bureau of Competition
Federal Trade Commission

JULY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3787

TICOR TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, SAFECO TITLE INSURANCE COMPANY (NOW KNOWN AS SECURITY UNION TITLE INSURANCE COMPANY), LAWYERS TITLE INSURANCE CORPORATION AND STEWART TITLE GUARANTY COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition for Review of an Order of the Federal Trade Commission (FTC Docket No. 9190)

Argued: August 28, 1990
Filed January 9, 1991

Present: HUTCHINSON and NYGAARD, *Circuit Judges*, and RE, *Judge* *

(Opinion Filed January 9, 1991)

* Hon. Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

Five of the nation's largest title insurance companies, Ticor Title Insurance Company, Chicago Title Insurance Company, SAFECO Title Insurance Company (now operating under the name Security Union Title Insurance Company), Lawyers Title Insurance Corporation and Stewart Title Guarantee Company (collectively Ticor), petition for review of a final order of the Federal Trade Commission (FTC). In a forty-seven page majority opinion that formed the basis of the FTC's final order, the FTC held that the five title insurance companies engaged in "[u]nfair methods of competition" in violation of § 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C.A. § 45(a)(1) (West Supp. 1990), when they collectively agreed to set rates for title search and examination services in six states. The final order found antitrust violations in Arizona, Connecticut, Montana, New Jersey, Pennsylvania and Wisconsin.

In its petition for review, Ticor does not dispute the FTC's holding that the horizontal price-fixing agreements among five of the nation's largest title insurance companies for title search and examination services at issue in this case were anti-competitive and unfair within the meaning of § 5 of the FTC Act. Instead, Ticor advances four alternate arguments for reversal of the FTC's final order. Ticor's first argument is that the state action doctrine, which traces its origin to the Supreme Court's opinion in *Parker v. Brown*, 317 U.S. 341 (1943), immunizes its challenged collective rate setting activities from antitrust liability. Ticor's second argument is that its challenged activities are exempt from the antitrust laws pursuant to § 3(a) of the McCarran-Ferguson Act, 15 U.S.C.A. § 1013(a) (West 1976). Ticor's third argument is

that its activities constitute joint petitioning of state regulators immune from antitrust liability under the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Ticor's final and most abbreviated argument, taking up less than two pages of the ninety pages of briefing it submitted in this cause, is that the FTC's final order is void because its proceeding violated the doctrine of separation of powers since the FTC exercises executive power and yet is not subject to the executive branch's control.[1]

For the reasons set for below, we hold that Ticor's collective rate setting for title search and examination services in these six states is immune from federal antitrust liability under the state action doctrine. As we examine in more detail below, the state action doctrine limits the reach of the FTC's enforcement jurisdiction. As a result, we find it unnecessary to address at any great length Ticor's other three arguments in favor of reversing the FTC's order. Thus, we will grant Ticor's petition for review and will vacate the FTC's final order.

---

[1] In 1985, Ticor filed suit against the FTC in the United States District Court for the District of Columbia challenging the prosecution of this action solely on grounds that the FTC was unconstitutionally exercising executive branch authority in violation of the principle of separation of powers. The district court dismissed the challenge as unripe since the FTC had yet to take final action. *See Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747 (D.D.C. 1986), *aff'd*, 814 F.2d 731, (D.C. Cir. 1987). While the court of appeals affirmed the district court's dismissal of the constitutional challenge, the three judges on its panel wrote separate opinions, no one of which garnered a majority, concerning whether the district court's dismissal was justified by a failure to exhaust administrative remedies, a lack of final agency action or a lack of ripeness. *See Ticor*, 814 F.2d 731.

I.

On January 7, 1985, the FTC issued an administrative complaint alleging that six [2] of the nation's largest title insurance companies had engaged in "[u]nfair methods of competition" in violation of § 5 of the FTC Act, 15 U.S.C.A. § 45(a)(1) (West Supp. 1990).[3]

The alleged antitrust violation was the insurers' agreements collectively to set rates for title search and examination services.[4] At one time or another, these insurers set uniform rates for title search and examination services through private "rating bureaus" in thirteen states. The FTC did not challenge the insurers' collective formulation of uniform rates for insuring against the risk of loss from defective title. Thus, this aspect of title insurance is not before us.

The matter came before an administrative law judge (ALJ) who held hearings and took evidence. The ALJ issued an initial decision and proposed order on December

[2] One of the six original respondents, First American Title Insurance Company, settled the charges against it in a consent agreement with the FTC. *See In re Ticor Title Ins. Co.*, No. 9190 (July 30, 1987) (LEXIS, Trade library, FTC file). Thus, the FTC's final order affected only five title insurance companies, all of whom have joined as petitioners before this Court.

[3] In the weeks following the FTC's initiation of this action in 1985, thirteen class action suits were filed against the insurance companies. The suits were consolidated for pretrial purposes and were settled in a judgment entered in June of 1986. Two state court challenges to the settlement judgment are pending, one in Arizona and one in Wisconsin.

[4] The initial complaint also challenged the insurers' collective formulation and filing of charges for settlement and escrow services. The FTC, in its final order, dismissed these portions of the complaint since the FTC's complaint counsel failed to develop a record sufficient to sustain the charges. Thus, the final order only affects the insurers' collectively set rates for title search and examination services.

26, 1986. The ALJ found without merit the insurers' claims that the collective formulation of rates for title search and examination services is part of the "business of insurance" exempt from the FTC Act pursuant to § 3(a) of the McCarran-Ferguson Act, 15 U.S.C.A. § 1013(a) (West 1976). The ALJ also rejected the insurers' claim that the challenged conduct was protected from antitrust liability under the *Noerr-Pennington* doctrine as joint petitioning of state regulators in an attempt to influence state policy.

As to the insurers' remaining defense of state action,[5] the ALJ ruled that in Connecticut and Wisconsin the insurers' collective rate setting was not supervised at all and thus could not satisfy the "active supervision" requirement of the doctrine. The ALJ held that the insurers' price-fixing in Arizona, Idaho, Montana, New Jersey and Pennsylvania satisfied the two-pronged state action defense and was thus immune from antitrust liability. Finally, the ALJ ruled that with respect to Ohio, the FTC's complaint counsel, who prosecuted the case on behalf of the govern-

[5] The "state action" doctrine protects private price-fixing if such conduct is (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) the state itself actively supervises the conduct. *See California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The original complaint challenged joint price-setting in thirteen states. The insurers raised the state action defense with respect to twelve of these thirteen states. Following the Supreme Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the FTC's complaint counsel declined to pursue charges concerning five of the thirteen states.

The issues tried before the ALJ relating to the state action defense were: (1) in New Jersey and Pennsylvania, did the state authorize joint rate-setting of title search and examination charges for attorney-agents and (2) in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin, was there active state supervision.

ment, failed to prove that the insurers used their rating bureau to establish uniform rates for title search and examination services.

The insurers appealed the ALJ's initial decision to the FTC, and complaint counsel cross-appealed. On September 19, 1989, the FTC, through four commissioners, issued its final order and decision affirming in part and reversing in part the ALJ's decision.[6] It is the FTC's decision that is before us for review.

In its decision, the FTC independently considered the record, including the ALJ's initial decision and findings. With respect to the insurers' state action defense, the FTC rejected its application to New Jersey and Pennsylvania, finding that the relevant state statutes did not clearly articulate a policy to displace competition with regulation.[7] The FTC found that the contrary position that the state insurance departments in both states advanced was in conflict with the plain and unambiguous meaning of the relevant state statutes.

The FTC also rejected the state action defense as to Arizona, Connecticut, Montana and Wisconsin on the

---

[6] The FTC's full compliment of commissioners is five. Commissioner Machol did not participate in the decision that resulted in the final order in this matter. Furthermore, Commission Chairman Steiger did not participate in the decision leading to the final order because she took her post after the FTC reached its decision but before the decision was issued. Chairman Steiger's predecessor, Chairman Oliver, "[p]rior to leaving the Commission . . . registered his vote in the affirmative for the Final Order and the Opinion of the Commission in this matter." Joint Appendix (Jt. App.) at 126 n.*.

[7] Commissioner Calvani dissented as to this conclusion. In its amicus brief filed in support of the insurers, the Pennsylvania Insurance Department, which is the state executive branch agency responsible for the execution and enforcement of all Pennsylvania insurance laws, also disagrees with this conclusion so far as it construes the law of Pennsylvania.

ground that the "active supervision" requirement of the state action doctrine was not satisfied.[8] The FTC dismissed the complaint's allegations concerning Idaho and Ohio. It split evenly over whether there was active supervision of the insurer's collective ratemaking in Idaho. It agreed with the ALJ that the FTC's complaint counsel failed to demonstrate a sufficient link between the collective filing of risk rates and fees for the insurers' search and examination services in Ohio.

Next, the FTC held that the insurers' collective formulation of charges for search and examination services was not part of the "business of insurance" and thus was not exempt from regulation under the FTC Act by reason of the McCarran-Ferguson Act. The FTC agreed with the ALJ that searches and examinations are services that persons and entities other than insurance companies commonly perform. Further, the FTC found that insurance companies themselves usually differentiate between the rates charged for indemnification against loss from nonrecord title defects (which the FTC viewed as the core function of title insurance) and the rates charged for tracking down title defects prior to writing the policy.

The FTC then went on to reject the insurers' claim that their collective ratemaking for search and examination services was immunized from antitrust regulation under the *Noerr-Pennington* doctrine. The FTC wrote that the challenged conduct was the type of commercial activity that has traditionally had its validity determined by the antitrust laws and was not "political activity with a commercial impact." Joint Appendix (Jt. App.) at 170.

---

[8] Commissioner Azcuenaga partially dissented from this holding, concluding instead that Arizona and Connecticut did actively supervise the insurers' rate-setting activities.

The FTC's final order to cease and desist prohibits the insurers from fixing prices for title search and examination services in the six states where violations of law were found. However, the order contains a proviso that permits collective establishment of rates for search and examination services in any of these states if undertaken "pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body." [9] Jt. App. at 125.

In their petition to this Court, the insurers ask us to reverse the FTC's final order. The FTC asks us to affirm the order and to issue our own order mandating its enforcement, which Congress requires us to do to the extent the FTC's order is affirmed. *See* 15 U.S.C.A. § 45(c) ("To the extent the order of the Commission is affirmed the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.").

II.

As a result of the FTC's dismissal in its final decision of the complaint's allegations concerning Ticor's settlement and escrow services, the issues before us relate solely to Ticor's collective setting of rates for title search and examination services. A brief description of title search and examination services, and the role such services play in the issuance of a policy of title insurance, is helpful to an understanding of this case.[10]

Title to a piece of real estate is evidence of an ownership interest in that property. However, title is not proof of absolute ownership. For example, a search of public records concerning a particular piece of real estate may disclose that there are liens, encumbrances, easements, covenants, restrictions or other claims in existence as to that property. Examination of the title itself would often reveal none of these preexisting defects.

[9] This proviso, of course, merely restates the requirements of the state action doctrine. *See supra* note 5.

[10] This description is based on the excellent survey of this area that the ALJ compiled in his opinion. *See* Jt. App. at 32-60.

As a result, potential purchasers of real estate and their lenders desire to know before purchasing or financing a purchase of property whether the title has any preexisting defects. Once such defects are discovered, the purchasers and lenders can determine whether to continue with the deal as is, whether to demand cure of certain or all of the defects or whether to call off the deal.

Title insurance did not become widely used until after the conclusion of World War II. At that time, a national market in secondary mortgages emerged. The attractiveness of title insurance was due in large part to the limitations inherent in the two methods of verifying title that existed prior to the widespread use of title insurance. These two methods that were seen as somewhat unsatisfactory were the use of title searchers and the use of attorneys' opinions.

The role of title searchers is clear from their name. They examine the public records concerning a piece of property, which includes the chain of title for that property, and report the results of that examination. A title searcher's liability for an erroneous report was limited, however, to his negligence. If the searcher made an error in searching the public records, someone harmed could recover only after proving that a reasonable title searcher would not have made such an error. Furthermore, a title searcher had no liability for title defects that were not listed in the public records. Title searchers continue to practice their trade today; however, most now work for title insurance companies.

The meaning of an attorneys' opinion is also largely self-evident. Whereas title searchers merely report on the existence of recorded documents concerning a particular title, an attorneys' opinion evaluates the legal significance of any title defects that have been discovered. However, an attorney's liability for an erroneous opinion is also limited to his professional negligence. Thus, just as with title searchers, an attorney is not liable for hidden defects in the public records that a diligent searcher could not have discovered or for public records that are themselves inaccurate.

By comparison, title insurance offers much broader protection in the event that the state of the title differs from that which a title insurance company reports it to be. The technical definition of title insurance is an agreement to indemnify the purchaser or lender "for loss or damage sustained by reason of a defect in title not explicitly excepted or excluded from the policy." Jt. App. at 37. In order to recover, it is unnecessary to prove negligence. Further, title insurance protects the buyer and the lender from losses resulting from defects not discoverable from a search of the public records. Such undiscoverable defects can include forgery, missing heirs, previous marital interests, impersonation and confusion of names.

As noted just above, title insurance indemnifies the purchaser or lender for loss or damage sustained by reason of a defect in title not explicitly excepted or excluded from the policy. Before issuing a title insurance policy, the insurance company conducts a search of the public records just as a title searcher or an attorney would do. In fact, title insurance companies most often employ their own searchers or attorneys to search and examine the public records. The title insurance policy usually will not insure any defects that are uncovered during this search. Instead, agents are trained specifically to exempt these record de-

fects from the scope of coverage. Thus, a title insurance policy usually insures only against undiscovered and undiscoverable title defects, regardless of negligence.

Title insurance companies choose from among three different groups of people to perform title searches. In the first group are title searchers who work for the title insurance company. We have already examined the role that such title searchers play. The second is the attorney-agent, who serves as an agent of one or several particular insurance companies. The attorney-agent searches and examines title documents. As compensation for his work, the agent receives from the title insurance company a fee that the insurance company has fixed in advance. The third is the approved attorney. An approved attorney does not have a direct employment relationship with the insurance company as does the attorney-agent. Instead, the title insurance company provides a list of approved attorneys to its customers; then, the customer and the approved attorney are free to negotiate the approved attorney's fee for the search and examination services he will perform. Often the same attorney will be an attorney-agent for one title insurance company and an approved attorney for another.

While often difficult to separate, a title search is distinct from a title examination. The search denotes the act of compiling a chronological account of the publicly recorded instruments that are found in the chain of title to a particular piece of real estate. Many jurisdictions require that the search extend back sixty years, although some jurisdictions have marketable title acts that require a shorter resort to history while other jurisdictions require tracing title as far back as its original issuance by the sovereign. The examination requires the critical evaluation of the title's condition as reflected in the documents gathered in the search.

This case involves Ticor's collective setting of rates for the search and examination services it performs. In the six states at issue, these rates are collectively set through private organizations known as title insurance rating bureaus. Title insurance companies comprise the membership of these bureaus. Once the title insurance rating bureau establishes the uniform rate for search and examinations services in a certain state, the insurance companies that are members of the bureau charge this rate for these services.

III.

We have jurisdiction pursuant to 15 U.S.C.A. § 45(c) (West 1973) over the FTC's final order in this matter, since the FTC's cease and desist order includes within its scope methods of competition practiced within this Circuit. Ticor filed its petition for review within sixty days after the FTC served the final order,[11] which is within the applicable time the statute provides for filing such a petition. The FTC had jurisdiction to adjudicate this matter pursuant to 15 U.S.C.A. § 45(b) (West Supp. 1990).

We have written that "the state action exemption cases clearly indicate that this issue involves a question of law . . ." *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982); *see also New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1072 (1st. Cir. 1990) ("How these facts meld into the state action concept—the issue now before us—is a legal issue which the courts have plenary authority to decide.). Thus, we exercise plenary review over the FTC's application of the state action doctrine to the facts before us.

[11] While the FTC issued its decision on September 19, 1989, the sixty days within which to petition for review of the decision did not begin to run until the FTC served its decision upon the insurers on October 20, 1989.

IV.

As the Supreme Court has stated, "[t]he starting point in any analysis involving the state-action doctrine is the reasoning of *Parker v. Brown* [, 317 U.S. 341 (1943)]." *Hoover v. Ronwin*, 466 U.S. 558, 566 (1984), In *Parker*, the Supreme Court wrote:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

Parker, 317 U.S. at 350-51. In *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987), the Supreme Court wrote that *Parker* "rests on principles of federalism and state sovereignty."

The "state action" doctrine immunizes private price-fixing if such conduct is (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) the state itself actively supervises the conduct. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

A.

As to New Jersey and Pennsylvania, the FTC determined that Ticor's fixing of title search and examina-

tion charges did not reflect a clearly articulated and affirmatively expressed state policy as is required under the first prong of the *Midcal* test. The FTC's complaint counsel conceded for purposes of this litigation that both New Jersey and Pennsylvania actively supervised Ticor's fixing of title search and examination services in the two states, thereby satisfying *Midcal's* second prong. *See* Jt. App. at 69 n.184.

Two Supreme Court cases are central to an understanding of *Midcal's* first prong, which requires that a state policy must be clearly articulated and affirmatively expressed in order to confer antitrust immunity. Those cases are *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), and *Southern Motor Carriers*, 471 U.S. 48.

In *Hallie*, the Supreme Court was faced with deciding whether a municipality's anticompetitive conduct met the first prong of the *Midcal* test.[12] In deciding whether the state clearly articulated and affirmatively expressed an anticompetitive policy, the Supreme Court adopted the views of the plurality in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (opinion of Brennan, J.), that one need not "be able to point to a specific, detailed legislative authorization" in order to satisfy *Midcal's* first prong. *See Hallie*, 471 U.S. at 39. Instead, the Court in *Hallie* held it was sufficient to satisfy the "clear articulation" test that Wisconsin's legislature had passed statutes giving the municipality "broad authority to regu-

[12] The Court held that a municipality, in order to qualify for state action immunity, need not satisfy the second prong of the *Midcal* test, which requires that the state actively supervise the anticompetitive conduct. *See Hallie*, 471 U.S. at 46-47, *see also Hancock Indus. v. Schaeffer*, 811 F.2d 225, 235 (3d Cir. 1987) ("In *Hallie*, the Court concluded that the second element of the *Midcal* analysis did not apply when a municipality was the decisionmaker.").

late," thus making it "clear that anticompetitive effects logically would result." *Id.* at 42; *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (while California's Automobile Franchise Act evidenced no express intent to displace the antitrust laws, it nevertheless qualified for state action immunity because Act provided a regulatory structure that inherently "displace[d] unfettered business freedom.").

Thus, in *Hallie* the Supreme Court held that in order to satisfy the clear articulation requirement of the state action test, one merely had to show that "the legislature contemplated the kind of action complained of." *Hallie*, 471 U.S. at 44 (quotation omitted). In so doing, the Court rejected a competing argument that to satisfy the clear articulation requirement the legislature had to "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *Id.* at 43. In a footnote, the Court explained why it rejected this argument:

> Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable . . . because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Id. at 44 n.7.

In *Southern Motor Carriers*, the Supreme Court held that a state did not have to compel private parties to perform anticompetitive conduct in order for the state action doctrine to immunize such conduct from antitrust liability. *See Southern Motor Carriers*, 471 U.S. at 60. Instead, a clearly articulated policy that permits anti-

competitive conduct is sufficient to meet the state action doctrine's clear articulation requirement. *See id.* at 61. Thus, the issue in *Southern Motor Carriers* was whether the state legislatures in Georgia, Mississippi, North Carolina and Tennessee clearly sanctioned the collective ratemaking at issue there.

The Court found that three of the states, Georgia, North Carolina and Tennessee, had statutes that expressly permitted common carriers to engage in collective ratemaking. *See id.* at 63. However, Mississippi posed a more difficult question, since its legislature "ha[d] not specifically addressed collective ratemaking." *Id.* Thus, the Court had to decide "whether, in the absence of a statute expressly permitting the challenged conduct, the first prong of the *Midcal* test can be satisfied." *Id.*

In Mississippi, the only evidence of whether the legislature had contemplated the actioln complained of was a law that gave the state public service commission the authority to regulate common carriers. *See id.* The law required the commission to promulgate "just and reasonable" rates. *See id.* The Court held that this law was sufficient evidence of the legislature's intent that the commission, instead of the competitive market, should determine the rates. Even though the legislature did not supply the details of "the inherently anticompetitive rate-setting process," *id.* at 64, it was sufficient that the legislature left such details up to the commission's discretion. Thus, when the commission "exercised its discretion by actively encouraging collective ratemaking among common carriers," the Supreme Court held that the carriers who took advantage of the ability to set rates collectively in Mississippi were immune from antitrust liability under the state action doctrine. *Id.* The Court concluded:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness. Therefore, we hold that if the State's intent to establish an anticompetitive regulatory program is clear, as it is in Mississippi, the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

Id. at 64-65 (citation and footnote omitted).

1.

With these teachings in mind, we will first examine whether the State of New Jersey has a clearly articulated and affirmatively expressed policy that permits Ticor to charge collectively set rates for title search and examination services that its attorney-agents perform. The FTC held, over the dissent of Commissioner Calvani, that New Jersey lacked such a policy and therefore ruled that Ticor's activities in that state were not immune under the state action doctrine. The FTC's holding reversed the ALJ's holding that New Jersey did authorize the collective setting of rates for fees paid to attorney-agents for the title search and examination services they perform. *See* Jt. App. at 111.

New Jersey law pertaining to title insurance companies is found at N.J. Stat. Ann. §§ 17:46B-1 to -62 (West 1985 & Supp. 1990). It is known as the Title Insurance Act of 1974. *See* N.J. Stat. Ann. § 17:46B-2. It is clear that New

Jersey's legislature intended the Act to have broad application. Section 17:46B-3 states:

> The provisions of this act shall apply to all title insurance companies, title insurance rating organizations, title insurance agents, applicants for title insurance, policyholders and to all persons and business entities engaged in the business of title insurance.

Id. § 17:46B-3.

The FTC based its holding that New Jersey did not have a clearly articulated policy that permitted the collective setting of fees to be paid to attorney-agents for the search and examination services they perform upon the Act's definition of "fee." *See id.* § 17:46B-1(f). While the Act permits title insurance companies to engage in the collective setting of rates, which include fees, through their privately operated rating bureaus, *see id.* §§ 17:46B-41 to -53, the FTC held that New Jersey's definition of "fee" explicitly excluded any reimbursement paid to an attorney.

The Act's definition of "fee" states:

> "Fee" for title insurance means and includes the premium for the assumption of the insurance risk, charges for abstracting or searching, examination, determining insurability, and every other charge, whether denominated premium or otherwise, made by any of them, but the term "fee" shall not include any charges paid to and retained by an attorney at law whether or not he is acting as an agent of a title insurance company or an approved attorney.

Id. § 17:46B-1(f).[13] Ticor argues that § 17:46B-1(f)'s

[13] The word "them" in the Act's definition of "fee" lacks an antecedent. However, reference to the immediately preceding definition, which explains the meaning of the term "premium," sheds light on this problem. Section 17:46B-1(e) states:

> "Premium" for title insurance means that portion of the fee

definition of fee is intended merely to make clear that the state will not regulate legal fees unrelated to title insurance transactions, such as issuing opinions.

In support of its argument, Ticor points to the fact that New Jersey's Commissioner of Insurance, the state official whom the legislature has charged with regulating the title insurance industry, has approved its collective filings of rates that included the charges paid to attorney-agents for title search and examination services. *See* Jt. App. at 626-59. The Act requires the Commissioner to disapprove any filing that "does not meet the requirements of this act." N.J. Stat. Ann. § 17:46B-45(b).[14] Further, Ticor points to the ALJ's finding that "the history of title insurance rate regulation in New Jersey suggests that the state intended that inclusive rates should apply to attorney-agents." Jt. App. at 68.

The state action doctrine rests on principles of federalism and state sovereignty. Since the Supreme Court of New Jersey has not yet spoken on whether the Act permits New Jersey to regulate attorney-agent charges for search and examination services, we are forced to predict how that court would resolve the question. The Act, taken as a whole, clearly indicates New Jersey's intent to regulate broadly the state's title insurance industry. In the face of

> charged by a title insurance company, agent of a title insurance company or approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for the assumption by the title insurance company of the risk created by the issuance of the title insurance policy.

N.J. Stat. Ann. § 17:46B-1(e).

[14] The Act also provides any aggrieved person with the ability to challenge any of the Commissioner's actions. *See* N.J. Stat. Ann. § 17:46B-52. The FTC has failed to bring to our attention any state challenge to the Commissioner's approval of collectively set rates that attorney-agents charge for search and examination services.

that strong intent, we believe the Supreme Court of New Jersey would hold that Ticor's suggested construction of the Act's definition of "fee" is reasonable. Under Ticor's construction, "fee" is defined to exclude charges paid to attorneys solely as a concession to the state's organized bar, in order to make clear that the Insurance Commissioner is not empowered to regulate generally the fees attorneys charge.

Under New Jersey law, where a state agency is empowered to implement a regulatory scheme pursuant to an ambiguous statutory framework, state courts will defer to the agency's reasonable construction of the statute. *See In re Township of Bridgewater*, 471 A.2d 1, 5-6 (N.J. 1984) ("We have held that an administrative agency's interpretation of a statute that it is charged with enforcing the entitled to due deference."). We believe the Insurance Commissioner's construction of the Act to permit his regulation of attorney-agents' charges for search and examination services is reasonable and thus worthy of our deference.

Furthermore, we believe it is possible to construe the Act to permit the Commissioner to regulate what attorney-agents charge for title search and examination services, even if such charges do in fact fall outside the Act's definition of "fee." In *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974), Judge Becker, then a United States District Judge and now a member of our Court, was faced with a similar quandary. There, the court had before it the question of whether the Pennsylvania state Insurance Department in fact regulated a charge that sellers of real estate had to pay at the closing of a sale when the closing occurred in the office of a title insurance company. While the Insurance Department refused to accept filing of the so-called "seller charge" as a fee, Judge Becker wrote that "[t]he Department's view that

the charge was not a 'fee' did not preclude its regulation under a number of other provisions, and the Department never suggested that it had no power to regulate the seller charge simply because it was not a 'fee'." *Id.* at 577 n.16. Thus, the court held: "We find that the Pennsylvania regulatory statutes are comprehensive and confer virtually plenary regulatory power on the state Insurance Department, including the power to regulate the seller charge." *Id.* at 577.

Likewise, we hold that the FTC erred when it held that New Jersey lacked a clearly articulated policy to permit the collective setting of rates attorney-agents will be paid for the search and examination services they provide. Even if we were to agree that such charges are excluded from the statutory definition of the word "fee," this does not preclude New Jersey from otherwise regulating this discrete charge.

Finally, we will once again assume that New Jersey's Insurance Commissioner lacks the statutory authority to regulate search and examination charges paid to attorney-agents. As Professors Areeda and Hovenkamp, distinguished students of antitrust law, have written: "If the private defendant's challenged conduct is the result of reasonable reliance on apparently lawful government action, then [state action] immunity [under *Midcal*'s clear articulation prong] should be available." P. Areeda & H. Hovenkamp, *Antitrust Law* § 212.4b, at 153 (Supp. 1989).

Even if New Jersey's Supreme Court should declare in the future that New Jersey's Insurance Commissioner's regulation of Ticor's collective setting of rates paid to attorney-agents for search and examination services was unlawful, we believe that the professors are correct that Ticor's action in reliance on the apparent lawfulness of the Commissioner's action would provide antitrust immunity up until such a declaration occurs. As the professors have

written: "The agency's action must have reasonably appeared to be lawful both in relation to the antitrust laws—for example, no wholesale delegation of unsupervised private power to act anticompetitively—and in relation to the scope of the agency's authority under state law." *Id.* at 154. We believe that Ticor meets both of these requirements in New Jersey. *See also Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.) (" 'ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control" (quoting Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harv. L. Rev. 435, 453 (1981))).

2.

The relevant facts in Pennsylvania are basically the same. The FTC held, over the dissent of Commissioner Calvani, that Pennsylvania lacked a policy that permitted the collective setting of rates that attorney-agents charge for search and examination services. The FTC therefore ruled that Ticor's activities in that state were not immune under the state action doctrine. The FTC's holding reversed the ALJ's holding that Pennsylvania did authorize the collective setting of rates for fees paid to attorney-agents for the title search and examination services they perform. *See* Jt. App. at 111.

Pennsylvania's Title Insurance Act, found at 40 Pa. Stat. Ann. §§ 910-1 to 910-54 (Purdon 1971 & Supp. 1990), also has broad application. It states:

> The provisions of this article shall apply to all title insurance companies, title rating organizations, title insurance agents, applicants for title insurance, policyholders and to all persons and business entities engaged in the business of title insurance.

40 Pa. Stat. Ann. § 910-2. The Pennsylvania Insurance Department is the state's executive agency entrusted with the responsibility of executing and enforcing all of Pennsylvania's insurance laws. *See* Brief of Pennsylvania Insurance Department as *amicus curiae* at 4. The Act requires insurance companies or the private rating organizations to which they belong to file with the Insurance Department a manual of fees. *See* 40 Pa. Stat. Ann. § 910-37(a).

Once again, in holding that Pennsylvania had not clearly articulated a policy that permits the collective setting of rates paid to attorney-agents for search and examination services, the FTC relied on the Act's definition of "fee." The definition states:

> "Fee" for title insurance means and includes the premium, the examination and settlement or closing fees, and every other charge, whether denominated premium or otherwise, made by a title insurance company, agent of a title insurance company or an approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for any policy or contract for the issuance of, or an application for any class or kind of, title insurance; but the term "fee" shall not include any charges paid by an insured or by an applicant for insurance, for any policy or contract, to an attorney at law acting as an independent contractor and retained by such attorney at law, whether or not he is acting as an agent of or an approved attorney of a title insurance company, or any charges made for special services not constituting title insurance, even though performed in connection with a title insurance policy or contract.

Id. § 910-1(5).

The Pennsylvania Insurance Department has approved Ticor's collectively set rates for charges paid to attorney-agents for title search and examination services, even though the Act requires the Department to reject any filings that do not "meet the requirement of this article." *Id.* § 910-40(a). No one has ever challenged the Department's regulation of these charges, even though Pennsylvania law entitles any "person aggrieved by any action of the commissioner, except disapproval of a filing or a part thereof," to an administrative hearing. *Id.* § 910-49(a).

Ticor again argues that the definition's exclusion of charges paid to attorneys was intended as a concession to the bar that the state's Insurance Department could not regulate the traditional business of lawyering. For the same reasons as were applicable to New Jersey, the FTC's holding with respect to Pennsylvania cannot stand. Given Pennsylvania's clear intent broadly to regulate the title insurance industry, we believe the Supreme Court of Pennsylvania, which has yet to address the issue, would find Ticor's construction of the definition of "fee" to be reasonable.

Since the Act is open to more than one reasonable construction, we believe the Supreme Court of Pennsylvania would defer to the Insurance Department's construction of the Act to permit its regulation of search and examination charges paid to attorney-agents. *See Masland v. Bachman*, 374 A.2d 517, 522 (Pa. 1977) (where specialized agency is entrusted with implementing act, agency's interpretation of act is "entitled to significant weight"); *Spicer v. Pennsylvania Dep't of Pub. Welfare*, 428 A.2d 1008, 1009 (Pa. Commw. Ct. 1981) ("It is well settled that the construction of a statute by those charged with its execution and application is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous." (internal quotations omitted)).

It is true that prior to 1975 Pennsylvania's Insurance Department did not construe the Act to allow it to regulate charges paid to attorney-agents when acting as title insurance agents. However, the principles of federalism and state sovereignty that underlie the state action doctrine do not permit us to question the merits of the Insurance Department's change in construction where the so-called "new" construction appears on its face to be reasonable.

Further, as the opinion in *Schwartz* explains, *see* 374 F. Supp. at 577 & n.16, even if Pennsylvania law did not permit its Insurance Department to regulate these charges as "fees," it seems clear that the Act nevertheless gives the Insurance Department the power to regulate these charges. Finally, Ticor was and is entitled to rely upon the Insurance Department's apparently lawful regulation of these charges and the state action doctrine will immunize its reliance until it becomes clear that the Insurance Department in fact has no authority to regulate title search and examination charges paid to attorney-agents in Pennsylvania.

3.

Therefore, we hold that Ticor has shown that both New Jersey and Pennsylvania have clearly articulated a policy that permits the collective setting of rates for charges paid to attorney-agents for title search and examination services. Since the FTC's complaint counsel stipulated before the ALJ that both New Jersey and Pennsylvania met the second, active supervision prong of the *Midcal* state action test, we conclude that Ticor's actions in New Jersey and Pennsylvania were immune from antitrust liability under the state action doctrine. Thus, we must grant Ticor's petition for review and vacate the FTC's final order to the extent it applies to Ticor's activities in New Jersey and Pennsylvania.

B.

The FTC held that Arizona, Connecticut, Montana and Wisconsin did not "actively supervise" Ticor's collective setting of rates and thus Ticor failed to satisfy the second prong of the *Midcal* test as to those four states. The FTC's complaint counsel stipulated before the ALJ that these four states authorized the anticompetitive activity, *see* Jt. App. at 65, so issues relating to *Midcal*'s second prong are all that remain before us.

The Supreme Court explained the rationale behind the active supervision requirement in *Patrick v. Burget*, 486 U.S. 94 (1988). It wrote:

> The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985); see id., at 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf"). The requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Id.*, at 46-47. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. The mere presence of some state involvement or monitoring does not suffice. The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Id. at 100-01 (some citations omitted).

In the aftermath of *Patrick*, it is clear that the active supervision test requires that the state "have and exercise" the power to review the particular anticompetitive acts. The Supreme Court found that state action immunity was not available in *Patrick* because the state did not "have" the power to supervise the challenged activity. *See id.* at 102.

In *Midcal* and *324 Liquor Corp.*, the Supreme Court articulated four factors that are pertinent in deciding whether a state actively supervises challenged conduct. They are: (1) whether the state establishes the rates, *see 324 Liquor Corp.*, 479 U.S. at 345; *Midcal*, 445 U.S. at 105; (2) whether the state reviews the reasonableness of the rates, *see* 479 U.S. at 345; 445 U.S. at 105; (3) whether the state monitors market conditions, *see* 479 U.S. at 345, 445 U.S. 106; and (4) whether the state had engaged in any "pointed reexamination" of its program, *see* 479 U.S. at 345; 445 U.S. at 106.

We believe the First Circuit's recent opinion in *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), is most instructive on what type of showing is necessary to satisfy *Midcal*'s active supervision prong. In *New England Motor Rate Bureau*, the FTC brought an enforcement action against a private rating bureau whose members were motor carriers. The members of the rating bureau had been collectively setting rates they would charge for transportation within the State of Massachusetts and several other New England states. The only issue before the court was whether Massachusetts actively supervised the motor carriers' collective rate setting so as to satisfy *Midcal*'s second prong.

Massachusetts used a "negative option" approach to regulate rates. Under this approach, filed rates became

binding unless the state rejected or suspended the rates within a specified time. While the state had "extensive power to suspend, reject or modify rates," *id.* at 1065, Massachusetts "ha[d] not in recent history rejected any of the rates . . . nor held hearings or investigations." *Id.*

Despite these facts, the First Circuit held that Massachusetts had and exercised the power to review and disapprove of anticompetitive acts that failed to accord with state policy. The court wrote that it was clear that a Massachusetts state agency had plenary power to review and disapprove of filed rates. *See id.* at 1070. As a result, the court held that the state agency had "the authority to 'review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy,' " *id.* at 1071, thus satisfying one of the two parts of the active supervision requirement.

Next, the court examined whether Massachusetts "exercised" the power that it "had." Criticizing the FTC's approach as "too demanding in the showing it would require as to the rigor and efficiency of a particular state's regulatory program," *id.*, the court wrote:

> Where as here the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state's own action, it would become a means for federal oversight of state officials and their programs.

Id.

Examining the four factors the Supreme Court mentioned in *Midcal* and *324 Liquor Corp*, the First Circuit noted that the Supreme Court never had written that all four factors must be present before a court can find that active supervision exists. *Id.* at 1074. In *New England Motor Rate Bureau*, the court held that the presence of the first two of the four factors, that Massachusetts sets the rates and that the state reviews the reasonableness of the rates, was sufficient to establish the existence of active supervision. In that case, the court found the other two factors, whether the state monitors the market and whether the state has engaged in any "pointed reexamination" of its program, to be absent. Nevertheless, their absence was not fatal to the establishment of active supervision. *Id.* at 1073.

1.

With respect to Arizona, the FTC held over the dissent of Commissioner Azcuenaga that active supervision of Ticor's collective ratemaking was lacking between 1968 and 1981.[15] In so holding, the FTC reversed the ALJ, who had held that active supervision was present in the state. As the basis of its holding, the FTC found a lack of active supervision because Ticor's 1968 filing went into effect essentially unreviewed and because Arizona's Insurance Department failed to undertake a formal examination of the rating bureau even though an Arizona statute permitted such an examination. In Arizona, Ticor collectively set its rates through the Title Insurance Rating Bureau of Arizona, a private organization comprised of title insurance companies.

---

[15] Arizona's rating bureau went out of business for all purposes on December 16, 1981. *See* Jt. App. at 83. Arizona revoked the rating bureau's corporate charter on October 1, 1983. *See id.*

Our first inquiry is to determine whether Arizona "had" the power to regulate Ticor's collective ratemaking. It is clear the answer to this first inquiry is "yes." State law required Arizona's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory. *See* Ariz. Rev. Stat. Ann. §§ 20-375(A) & 20-376(D). State law also required title insurers to provide with their rate filings a statement justifying the rates. *See id.* § 20-377. Finally, the state's Insurance Department was required to reject any rates if they did not meet the statutory criteria. *See id.* § 20-378(A).

Next, we must examine whether Arizona "exercised" its power to regulate Ticor's collective ratemaking. We believe the First Circuit undertook the proper inquiry in *New England Motor Rate Bureau*. Thus, we will examine whether Arizona's program of supervision was in place, was staffed and funded, had granted to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, was enforceable in the state's courts, and had demonstrated some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. If so, "more need not be established." *New England Motor Rate Bureau*, 908 F.2d at 1071.

The facts before us demonstrate that Arizona's program of supervision was in place between 1968 and 1981. *See* Jt. App. at 81. Further, there is every indication that Arizona's Insurance Department was staffed and funded durinig this period. Next, as we have already seen, the Arizona legislature granted the Insurance Department ample power and the duty to enforce the law pursuant to the legislative standards. This duty was enforceable in

Arizona's state courts. *See Industrial Dev. Auth. of the County of Pinal v. Nelson*, 509 P.2d 705, 714 (Ariz. 1973) (action for a writ of mandamus is available to compel a public official to perform his duty).

Finally, the record demonstrates that the Insurance Department engaged in some basic level of activity directed at ensuring that Ticor carried out the state's policy and not simply its own. Following Ticor's rate filing in 1968, the Arizona Insurance Department sought information as to how a component of the rates was derived. The chief deputy director of Arizona's Insurance Department testified that every filing submitted from 1973 to 1982 "was examined to see if it met the statutory requirements. It was scrutinized and it was either approved or disapproved. There would sometimes be situations where more information was needed and once that was obtained and [the filing] met the requirements, it would be approved." Jt. App. at 1153. The ALJ found that no filing went into effect in Arizona until the director of the Insurance Department marked the filing "approved." Jt. App. at 80.

Turning next to the four factors the Supreme Court discussed in *Midcal* and *324 Liquor Corp*, it is clear that Arizona has the final word in setting title insurance rates. These rates must be filed with the Insurance Department, and they cannot go into effect if the Insurance Department suspends or rejects them. It is also clear that Arizona has reviewed the reasonableness of the title insurance rates. The record before us does not show whether Arizona's Insurance Department in fact monitors market conditions. The record does show that Arizona has not undertaken a "pointed reexamination" of its program. As the First Circuit held in *New England Motor Rate Bureau*, we hold that the absence of the final two *Midcal* and *324 Liquor Corp.* factors is not fatal to Ticor's state action defense.

The FTC erred when it held that Ticor failed to show that Arizona actively supervised its collective filing of rates. Arizona both had and exercised the power to ensure that Ticor's rates complied with the policy that state has articulated.

The root of the FTC's error and its explanation seem to lie in its insistence on sitting "in judgment upon the degree of *strictness* or *effectiveness* with which a state carries out its own statutes." *New England Motor Rate Bureau*, 908 F.2d at 1076 (emphasis in original). As in that case, the FTC here takes the position "that the 'active supervision' prong necessitates an inquiry by the FTC into whether a particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness. The FTC would, in effect, try the state regulator." *Id.* at 1075. We agree with the First Circuit's conclusion that "this goes too far." *Id.*

2.

With respect to Connecticut, the FTC over Commissioner Azcuenaga's dissent held that no active state supervision was present. The FTC's holding affirmed the ALJ's conclusion that active supervision was lacking in Connecticut. The FTC did not find active supervision in Connecticut because it believed that the state failed meaningfully to regulate the level of agency commissions, over which the insurance companies had no control. We disagree with the FTC's holding.

Our first inquiry is whether Connecticut officials have the authority to supervise Ticor's collective filing of rates. As with Arizona, it is clear the answer is "yes." State law required Connecticut's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory. *See* Conn Gen. Stat. Ann. § 38-201x(b)(2) (West 1987). State law also required title insurers to provide with their rate filings a statement

justifying the rates. *See id.* § 38-201x(a)(2). Finally, the state's Insurance Department was required to reject any rates if they did not meet the statutory criteria. *See id.* § 38-201p(b).

Next, we review whether Connecticut "exercised" the authority it had to supervise Ticor's collective filing of rates. The record shows that Connecticut's program of supervision was in place during the relevant time and that it was staffed and funded. Connecticut granted to its state officials ample power and the duty to regulate pursuant to declared standards of state policy. This duty was enforceable in the state's courts. *See Beccia v. City of Waterbury*, 441 A.2d 131, 136 (Conn. 1981) (action for a writ of mandamus is available to compel a public official to perform his duty).

Further, Connecticut's Insurance Department demonstrated some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. Following Ticor's 1966 rate filing, the state's Insurance Department requested justification for the premium fee. *See* Jt. App. at 71. The Insurance Department later approved the 1966 rate filing. *See id.* Ticor's second collective filing in Connecticut occurred in 1981. It is clear that the Insurance Department read the filing and approved it. Ticor's final collective filing in Connecticut took place in 1983. The Insurance Department approved the 1983 filing, even though Ticor had yet to supply supporting data. A Connecticut regulator testified that the state's Insurance Department "reviews every filing that we receive." Jt. App. at 1218. Just as with Arizona, Connecticut satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors. For these reasons, Ticor has established that Connecticut exercised its power to control Ticor's collective rate setting activity in that state.

The basis of the FTC's contrary holding is its finding that Connecticut failed "meaningfully" to regulate the

levels of agent commissions, which Commissioner Strenio, the author of the FTC's majority opinion, described as excessively high in his separate supplemental statement. *See* Jt. App. at 195. This description is telling. The FTC's analysis is inconsistent with the principles that inform the state action doctrine. State action immunity is available not only when a state acts wisely; instead, the wisdom of a state's policy is immaterial. As the Supreme Court has written, state action immunity is available wherever a state clearly articulates and actively supervises a policy that will displace competition.

3.

In Montana, the private rating bureau Ticor belonged to received its license in 1982 and ceased to exist in 1984. Its only major rate filing occurred in February, 1983. The ALJ found that active state supervision existed in Montana. The FTC disagreed, holding that the 1983 filing went into effect without any state review.

Once again, we begin by asking whether Montana's officials had the authority to supervise Ticor's collective filing of rates. As with Arizona and Connecticut, it is clear the answer is "yes." State law required Montana's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory. *See* Mont. Code Ann. §§ 33-1-311 & 33-16-201. State law also required title insurers to provide with their rate filings a statement justifying the rates. *See id.* § 33-16-203. Finally, the state's Insurance Department was required to reject any rates if they did not meet the statutory criteria. *See id.* §§ 33-16-204 to 33-16-206, 33-16-211. This is sufficient to establish that Montana's Insurance Department had the power to supervise Ticor's collective filings of title search and examination charges.

Next, we review whether Montana "exercised" the authority it had to supervise Ticor's collective filing of rates. The record shows that Montana's program of supervision was in place during the relevant time and that it was staffed and funded. Montana granted to its state officials ample power and the duty to regulate pursuant to declared standards of state policy. This duty was enforceable in the state's courts. *See Jeppeson v. Montana, Dep't of State Lands*, 667 P.2d 428, 431 (Mont. 1983) (action for a writ of mandamus is available to compel a public official to perform his duty (quoting Mont. Code Ann. § 27-26-102(1)).

Further, Montana's Insurance Department demonstrated some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. Ticor supported its 1983 filing with a five page single-spaced cover letter. *See* Jt. App. at 500-04. Following the filing, someone from Ticor's rating bureau met with officials of Montana's Insurance Department. *See id.* at 90. The state officials told Ticor's representative that the increase would go into effect immediately and approved the filing. *See id.* However, the state officials requested additional supporting data.[16] *See id.* Just as with Arizona and Connecticut, Montana satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors. For these reasons, Ticor has established that Montana exercised its power to control Ticor's collective rate setting activity in that state.

The FTC's conclusion was based upon its belief that Montana did not do enough to confer state action immunity upon Ticor. To the contrary, we believe that while the quality of Montana's actions may deserve the criticism that the FTC levels, the quantity of Montana's actions are sufficient to allow Ticor to invoke the state action doctrine.

---

[16] There is no evidence that Ticor ever supplied this supporting data. *See* Jt. App. at 90.

4.

In Wisconsin, the rate bureau Ticor belonged to submitted general rate filings in 1971, 1981 and 1982. The ALJ held that there was no active state supervision in Wisconsin. The FTC affirmed.

Again, we first examine whether state officials in Wisconsin had the power to regulate Ticor's collective filing of rates for title search and examination services. As with Arizona, Connecticut and Montana, it is clear the answer is "yes." State law required Wisconsin's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory. *See* Wisc. Stat. Ann. § 625.11(1). State law also required title insurers to provide with their rate filings a statement justifying the rates. *See id.* § 625.13. Finally, the state's Insurance Department was required to reject rates following a hearing if they do not meet the statutory criteria. *See id.* § 625.22. This is sufficient to establish that Wisconsin's Insurance Department had the power to supervise Ticor's collective filings of title search and examination charges.

Next, we review whether Wisconsin "exercised" the authority it had to supervise Ticor's collective filing of rates. The record shows that Wisconsin's program of supervision was in place during the relevant time and that it was staffed and funded. Wisconsin granted to its state officials ample power and the duty to regulate pursuant to declared standards of state policy. This duty was enforceable in the state's courts. *See Law Enforcement Standards Bd. v. Village of Lyndon Station*, 305 N.W.2d 89, 99-100 (Wis. 1981) (" 'Mandamus is the proper remedy to compel public officers to perform duties arising out of their office and presently due to be performed.' ").

Further, Wisconsin's Insurance Department demonstrated some basic level of activity directed towards seeing

that Ticor carried out the state's policy and not simply its own policy. Wisconsin's Insurance Department raised questions regarding the 1971 filing and later ruled that it was acceptable. The Insurance Department checked the 1981 filing for accuracy. The 1982 filing also received some review from Insurance Department. Just as with Arizona, Connecticut and Montana, Wisconsin satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors. For these reasons, Ticor has established that Wisconsin exercised its power to control Ticor's collective rate setting activity in that state.

5.

The FTC held that Arizona, Connecticut, Montana and Wisconsin failed *Midcal*'s adequate supervision prong because the regulators in those states were unqualified, they approved rates that the FTC's commissioners would not have approved and they generally did not regulate to the degree that the FTC found desirable. Even if the FTC is correct, its conclusions miss the point. Availability of the state action doctrine does not depend upon the quality of state supervision. The principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable. Instead, the state action doctrine recognizes that states can implement anticompetitive policies, even policies that depend upon private actors such as Ticor, free from federal supervision where the state clearly articulates and actively supervises the policy.

The FTC's complaint counsel stipulated that Arizona, Connecticut, Montana and Wisconsin clearly articulated the anticompetitive policies at issue here. We have held that these states actively supervised those same anticompetitive policies. Thus, Ticor's setting of collective rates for title search and examination services in these four

states is immune from antitrust liability. We therefore must vacate the remainder of the FTC's final order.[17]

V.

Accordingly, we hold that Ticor's collective setting of rates charged for title search and examination services in Arizona, Connecticut, New Jersey, Pennsylvania, Montana and Wisconsin is immune from antitrust liability under the state action doctrine. As a result, the FTC lacked jurisdiction to bring an enforcement action against Ticor. We will thus grant Ticor's petition for review and vacate the FTC's final order in its entirety.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

---

[17] Because we hold that Ticor's setting of collective rates for search and examinations services in all six states is immune from antitrust liability under the state action doctrine, it is unnecessary to consider whether the same activity is also exempt from antitrust regulation under the McCarran-Ferguson Act as the business of insurance or is exempt from antitrust regulation as protected petitioning of state regulators under the *Noerr-Pennington* doctrine. *See, e.g., Southern Motor Carriers Rate Conference*, 471 U.S. at 55 n.17 (1985) (finding of state action immunity "makes it unnecessary to consider the applicability of [the *Noerr-Pennington*] doctrine to the petitioners' collective ratemaking activities.").

Furthermore, we decline to address Ticor's separation of powers argument. This is an attack on the administrative state. Whatever the merits of such an attack, Ticor has failed to present us with a fully developed argument; its argument that we should hold that the FTC operates in violation of the principle of separation of powers since it performs an executive function and yet is not subject to executive branch control is cursory at best, taking up less than two pages of its brief. As the Seventh Circuit wrote in a similar situation, "Brevity may be the soul of wit, but seismic constitutional change is not a laughing matter." *See Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89-3787

TICOR TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, SAFECO TITLE INSURANCE COMPANY (NOW KNOWN AS SECURITY UNION TITLE INSURANCE COMPANY), LAWYERS TITLE INSURANCE CORPORATION AND STEWART TITLE GUARANTY COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition for Review of an Order of the Federal Trade Commission (FTC Docket No. 9190)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ALITO, *Circuit Judges,* and RE, *Judge**

The petition for rehearing filed by respondent in the above captioned matter having been submitted to the judges who participated in the decision of this court and to

---

* Hon. Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation. Judge Re was limited to voting for panel rehearing.

all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Sloviter, Judge Becker and Judge Scirica would grant rehearing.

By the Court,
/s/ WILLIAM D. HUTCHINSON
Circuit Judge

DATED: Mar. 12, 1991

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: JANET D. STEIGER, CHAIRMAN
TERRY CALVANI
MARY L. AZCUENAGA
ANDREW J. STRENIO, JR.
MARGOT E. MACHOL

Docket No. 9190

In the Matter of

TICOR TITLE INSURANCE COMPANY, A CORPORATION,
CHICAGO TITLE INSURANCE COMPANY, A CORPORATION,
SAFECO TITLE INSURANCE COMPANY, A CORPORATION,
LAWYERS TITLE INSURANCE CORPORATION, A CORPORATION,
AND
STEWART TITLE GUARANTY COMPANY, A CORPORATION.

By the Commission, Commissioner Calvani and Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Machol not participating.*

SEAL

DONALD S. CLARK
SECRETARY

* Prior to leaving the Commission, former Chairman Oliver registered his vote in the affirmative for the Final Order and the Opinion of the Commission in this matter. Chairman Steiger did not register a vote in this matter.

IT IS ORDERED, that the Initial Decision of the Administrative Law Judge be adopted as Findings of Fact and Conclusions of Law except to the extent inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

I.

For purposes of this Order, the following definition shall apply:

a. "Title search and examination services" means all activities which are designed to identify and describe the ownership of a particular parcel of real property as well as any other actual or potential rights to, encumbrances on, or interest in the property.

II.

IT IS ORDERED that each respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device in connection with the sale of title search and examination services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist in New Jersey, Pennsylvania, Connecticut, Wisconsin, Arizona, and Montana, from discussing, proposing, setting, or filing any rates for title search and examination services through a rating bureau.

A. *Provided* that nothing in this Order shall prohibit respondents from collectively setting or adhering to prices for title search and examination services in any state where such collective activity is engaged in pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body.

III.

IT IS FURTHER ORDERED that each respondent shall within thirty days after service of this Order deliver a copy of this Order to all its present officers, directors, and personnel having any responsibility in determining company prices as well as to the commissioner of insurance in each state listed in Paragraph II. of this Order.

IV.

IT IS FURTHER ORDERED that each respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

V.

IT IS FURTHER ORDERED that each respondent shall, within ninety days after service upon it of this Order, and at such other times as the Commission shall require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

By the Commission, Commissioner Calvani and Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Machol not participating.*

SEAL /s/ DONALD S. CLARK

Donald S. Clark
Secretary

* Prior to leaving the Commission, former Chairman Oliver registered his vote in the affirmative for the Final Order and the Opinion of the Commission in this matter. Chairman Steiger did not register a vote in this matter.

ISSUED: September 19, 1989

ATTACHMENTS:

Opinion of the Commission
Statement of Commissioner Calvani Concurring in Part and Dissenting in Part
Statement of Commissioner Azcuenaga Concurring in Part and Dissenting in Part
Additional Statement of Commissioner Strenio

OPINION OF THE COMMISSION

By Strenio, *Commissioner*:[1]

I. STATEMENT OF THE CASE

On January 7, 1985, the Federal Trade Commission (Commission) issued a Complaint charging Respondent title insurers with a violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §45. More specifically, the Commission charged that the Respondents, operating through rating bureaus, had restrained competition in setting rates for title search and examination services and settlement services.

The gravamen of the complaint appears in Paragraph 11:

[1] The abbreviations used in this opinion are as follows:
ALJ: Administrative Law Judge
CC: Complaint Counsel
CCAB: Complaint Counsel's Answering Brief
CCRB: Complaint Counsel's Rebuttal Brief
F.: ALJ's Findings
ID: Initial Decision
RAB: Respondents' Appeal Brief
RRB: Respondents' Reply Brief

> Respondents have agreed on the price to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the Respondents have fixed prices with other Respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.

Respondents, in turn, challenged the Commission's subject matter jurisdiction on the grounds that their activity was part of the business of insurance and therefore exempt from the FTC Act by reason of the McCarran-Ferguson Act. Respondents' answers also assert that the alleged anticompetitive practices are immune from antitrust prosecution by reason of the "state action" doctrine. Additional defenses raised on appeal are described below.

On December 26, 1986, Administrative Law Judge (ALJ) Needelman issued his initial decision, finding a law violation for activity in Connecticut and Wisconsin. The ALJ further found that search and examination by title insurers in connection with the issuance of a title insurance policy was not the "business of insurance."

This matter is now before the Commission on Respondents' Appeal Brief, to which Complaint Counsel has filed an Answering Brief. Additionally, Respondents have filed a Reply Brief and Complaint Counsel has filed a Rebuttal Brief.[2] In their Appeal Brief, Respondents argue that the

[2] Complaint Counsel requested leave to file a brief discussing the impact on this case of the Supreme Court's decision in *Patrick v. Burget*, 108 S. Ct. 1658 (1988). Respondents did not oppose this motion and requested leave to file a supplementary brief. The Commission granted the parties' requests and said briefs were filed.

ALJ erred in finding that Connecticut and Wisconsin did not "actively supervise" rating bureau filings. Further, Respondents argued that the ALJ erred in ruling that Respondents' rating bureau activities are not the "business of insurance." Additionally, Respondents argued that the ALJ erred in failing to apply the *Noerr-Pennington* doctrine to Respondents' collective petitioning of state regulators; that Respondents' rating bureau activities should be evaluated under a "rule-of-reason" analysis; and that the terms of the relief ordered by the decision were improper.

Complaint Counsel disagreed with the ALJ to the extent that he found "active supervision" existed in several states. Complaint Counsel also argued that Respondents failed to meet the first prong of the *Midcal* test (that there be a clearly articulated and affirmatively expressed state policy to displace competition) as to Pennsylvania and New Jersey. Complaint Counsel also would have fashioned differently the scope of the order proposed by the ALJ.

For the reasons set forth below, we affirm the ALJ in part and reverse in part.

In brief, we find that Respondents' activities in New Jersey, Pennsylvania, Connecticut, Wisconsin, Arizona,[3] and Montana are not beyond the purview of the federal antitrust laws.

Respondents' attempt to invoke the state action defense fails as to New Jersey and Pennsylvania because the statutes do not clearly articulate a state policy permitting a displacement of competition for charges to and retained by an attorney. Indeed, attorneys are specifically exempted from the statutory provisions invoked by Respondents.

[3] We also find that the doctrine of *res judicata* does not bar Commission action as to Arizona.

The attempt fails as to Connecticut, Wisconsin, Arizona, and Montana because Respondents' private conduct was not actively supervised by the state. The active supervision prong of the state action defense requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy rather than merely the party's individual interests. We dismiss the complaint, however, as it relates to settlement or escrow services, because the record as to those services was not developed.

Further, we find that Respondents' search and examination services are not the "business of insurance" and therefore are not exempt from antitrust challenge. These services, commonly provided by non-insurance entities, do not have the indispensable element of risk spreading or transfer necessary to qualify as the business of insurance.

Moreover, we hold that Respondents' activities are not protected from antitrust challenge under the *Noerr-Pennington* doctrine. Rather, because of the "context and nature" of this activity, we conclude that it is commercial activity of the type that traditionally has had its validity determined by the antitrust laws. This is merely private activity to set rates collectively—the equivalent of horizontal price-fixing—not a collective attempt to persuade the state to require such ratemaking. We also find this activity inherently suspect and an appropriate candidate for *per se* analysis, under the reasoning we employed previously in *Massachusetts Board of Registration in Optometry, infra.*

II. DESCRIPTION OF RESPONDENTS' ACTIVITIES

Respondent insurers are engaged in the business of insuring the ownership of real estate for buyers and those

lenders (mortgagees) who rely on real estate as security for their loans. As part of the package of services they offer, Respondents provide search and examination and settlement or escrow services.[4] We adopt the ALJ's factual description of these activities. *See* ID at 12-45 and further discussion *infra.*

III. STATE ACTION DEFENSE

One critical issue on appeal is whether the ratemaking activities here are beyond the purview of the federal antitrust laws by virtue of the state action doctrine.[5] As we stated in our decision in *New England Motor Rate Bureau, Inc.,* F.T.C. - , Docket No. 9170, slip op. at 10-11 (Aug. 18, 1989) ("*New England*"), the state action doctrine attempts to resolve any conflicts that arise between the national economic policy in favor of competition, as embodied in the federal antitrust laws, and the principle of federalism. Under this doctrine, restraints on competition are protected from antitrust attack if they constitute "state action or official action directed by a state." *Parker* v. *Brown,* 317 U.S. 341, 351 (1943).

The Supreme Court has stated that a "gauzy cloak of state involvement" in private anticompetitive conduct is not sufficient to confer antitrust immunity. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 106 (1980). In *Midcal,* the Supreme Court

[4] We agree with the assessment of the ALJ that the complaint allegation respecting settlement or escrow services was an ancillary issue, barely addressed in this proceeding. The complaint is dismissed as to those services. *See* discussion *infra.* Our opinion therefore focuses on the search and examination issue.

[5] The state action doctrine is available in Section 5 cases applying Sherman Act standards. *E.g., Asheville Tobacco Board of Trade, Inc., v. FTC,* 263 F.2d 502 (4th Cir. 1959).

spelled out criteria that anticompetitive conduct undertaken by private entities must satisfy in order to qualify as exempt "state action": (i) the challenged conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition with regulation; and (ii) the conduct must be "actively supervised" by the state itself. *Id.* at 105-06; *see also Patrick* v. *Burget,* 108 S. Ct. 1658 (1988); *Southern Motor Carriers Rate Conference* v. *United States,* 471 U.S. 48 (1985).

A. CLEAR ARTICULATION (THE FIRST *MIDCAL* PRONG)

The only issue for determination as to Respondents' conduct in New Jersey and Pennsylvania is whether the state statutes give state action protection under the "clear articulation" prong of *Midcal* to collectively fixed rates charged for search and examination services when performed by attorney-agents.[6] Complaint Counsel argues that the statutes in Pennsylvania specifically exclude from the statutory definition of "fees" that are to be filed with the state insurance departments any charges that are paid to and retained by an attorney at law, whether such attorney is acting as an agent of a title insurance company or as an approved attorney of a title insurance company. Complaint Counsel asserts that in both states Respondents have fixed prices for charges paid to and retained by their attorney agents.

[6] The parties have stipulated, for the purposes of this litigation, that there has been active supervision in Pennsylvania and New Jersey sufficient to satisfy the second prong of the *Midcal* test for a state action defense.

Respondents argue, in turn, that special deference should be given to a state administrative agency's interpretation of its own regulatory statute, citing *Midcal* and other cases. RRB at 68, n.55. They thus rely on an amicus brief filed by the Pennsylvania insurance department and testimony by the New Jersey insurance department favoring their interpretation of the statute—that attorney agent fees are not excluded from the statutory definitions of fees. Respondents criticize Complaint Counsel's argument that the statute is "perfectly clear on its face." RRB at 70. They admit that the statutes "are susceptible to multiple interpretations." RRB at 70. But Respondents further argue that the meaning of the statutes cannot be discerned "without resort to the larger purpose and structure of the state statutes." RRB at 71. In both states, there is comprehensive regulation of the title insurance industry. RRB at 71-72. The "fee" definition which gives rise to Complaint Counsel's argument is said to be merely "an accommodation to members of the state bar who were concerned that legislation governing title insurance might be construed as regulating the legal fees of real estate attorneys." RRB at 72.

The ALJ found that the statutes were "ambiguous," ID at 91, but rested his holding that the first *Midcal* prong protected the activities of Respondents in these two states on the interpretation given the relevant statutes by state officials. He stated that Complaint Counsel's contrary assertion may have been more credible had it been supported by other evidence.

Crucial to Complaint Counsel's argument as to New Jersey and Pennsylvania are the following statutes. In New Jersey, the statute in controversy, *N.J. Stat. Ann.* 17:46B-1(f), reads in relevant part:

> "Fee" for title insurance means and includes the premium for the assumption of the insurance risk, charges for abstracting or searching, examination, determining insurability, and every other charge, whether denominated premium or otherwise, made by any of them, but the term "fee" *shall not include any charges paid to and retained by an attorney at law whether or not he is acting as an agent of a title insurance company or an approved attorney.* (emphasis supplied)

In Pennsylvania, Section 701(5) of the Pennsylvania Insurance Company Law broadly provides that fees for title insurance are subject to regulation but contains the following proviso:

> "Fee" for title insurance means and includes the premium, the examination and settlement or closing fees, and every other charge, whether denominated premium or otherwise, made by a title insurance company, agent of a title insurance company or an approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for any policy or contract for the issuance of, or an application for any class or kind of, title insurance; but the term "fee" *shall not include any charges paid by an insured or by an applicant for insurance, for any policy or contract, to an attorney at law acting as an independent contractor and retained by such attorney at law, whether or not he is acting as an agent of or an approved attorney of a title insurance company*, or any charges made for special services not constituting title insurance, even though performed in connection with a title insurance policy or contract. (emphasis supplied)

We find that the statutes in New Jersey and Pennsylvania do not clearly articulate a state policy permitting a

displacement of competition regarding these charges. Indeed, the statutes appear to do the opposite—attorney agents are singled out of the statutory scheme. Both statutes unambiguously exclude from their definition of "fees" that are regulated "any charges" paid to and retained by an attorney. Despite this, in both states Respondents have fixed prices for charges paid to and retained by their attorney agents. Since the statutes are clear on their face, the "plain meaning" rule of statutory construction must prevail. (We note in passing that no evidence of contrary legislative intent has been entered into the record.)

Further, deference to an agency's interpretation comes into play only when the statute is ambiguous, *SEC* v. *Sloan*, 436 U.S. 103, 117-19. Deference is not appropriate merely because an interpretation is long standing, since an agency "may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."[7] *Sloan*, 436 U.S. at 117-19 (1978).

B. ACTIVE SUPERVISION (THE SECOND *MIDCAL* PRONG)

To qualify for state action immunity, private conduct also must have been actively supervised by the state. *Midcal*, 445 U.S. at 105. The Supreme Court in *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46 (1986), stated that the active supervision requirement "serves essentially an evidentiary function; it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to

[7] We note further that the Pennsylvania insurance agency's interpretation is relatively recent. In Pennsylvania between 1921 and 1975, rates filed by the rating bureau did not include attorney-agent charges. "Prior to 1975, the Pennsylvania insurance department obviously did not believe that charges made by attorney agents . . . were within the department's regulatory control." CCAB at 133.

state policy . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interest of the State."

The Supreme Court recently elaborated on the requirement of active state supervision in *Patrick* v. *Burget*, 108 S. Ct. at 1658. There, a physician in Oregon alleged that competing physicians conspired to terminate his surgical privileges at the one hospital in a community. Plaintiff alleged that the defendants had initiated and participated in proceedings before the hospital's peer-review committee that culminated in a recommendation to terminate the plaintiff's staff privileges. These proceedings allegedly were undertaken for the sole purpose of reducing competition from plaintiff. The Court held that the state action doctrine did not apply to the challenged conduct because Oregon did not actively supervise the decisions of hospital peer review committees.

> [T]he active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. * * * The mere presence of some state involvement or monitoring does not suffice.

108 S. Ct. at 1663.

To establish active state supervision, it is not enough merely to show, as Respondents contend, that the state statute governing the anticompetitive activity provides some mechanism for regulatory oversight. There must be a

showing that the state actually exercised its authority. *Patrick* v. *Burget*, 108 S. Ct. at 1663. It is only through such an affirmative exercise that the state's intent can be discerned. Moreover, there must be a "program of supervision." *Id*. "The mere presence of some state involvement or monitoring does not suffice." *Id*. We understand this to mean that isolated instances of review—such as reviewing rate proposals submitted in 1990 and 1995 but not reviewing those submitted in the intervening years—will not suffice. Otherwise, a single instance of review illogically could shield anticompetitive behavior from antitrust challenge in perpetuity.

Thus, it is necessary to look at the entire program of supervision. We recognize that it would not be incumbent upon a respondent to show that every single piece of data filed with a rate commission was reviewed. Certainly, the use of sound sampling techniques would be permissible. It is reasonable to require, however, that the review activity be continuous. Consequently, our assessment of the regulatory activity in each state below will look at the review activity as a whole and seek to determine whether there was a general "program of supervision"—not whether each and every rate was reviewed.

On the other hand, isolated instances of review will not suffice—otherwise there could be no "program of supervision." The state's involvement in the challenged activity must be more than peripheral to qualify as active supervision. In *Midcal*, for example, the Supreme Court emphasized that the state had not established prices, reviewed the reasonableness of price schedules, regulated the terms of fair trade contracts, monitored market conditions, or engaged in a "pointed reexamination" of the program. 445 U.S. at 105-106. Rather, the state's enforcement activities merely had cast a "cloak of state involvement over what

[was] essentially a private price-fixing arrangement."[8] *Id*. at 106.

These decisions demonstate that a state official or agency must engage in an affirmative, substantive review of the challenged conduct before active supervision can be found. Such review ensures that the state agency has consciously considered the anticompetitive consequences of the activity for which private parties seek approval. As we stated in *New England*, ____ F.T.C. at ____, slip op. at 15, "[n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance or nonsubstantive review of rate filings." Thus, we hold that the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate. Moreover, there must be a program of supervision, not merely isolated instances of review.

This case also raises the question of who has the burden of proving active supervision. Complaint Counsel argues that although the ALJ recognized that the state action doctrine is a matter of affirmative defense, he impermissibly shifted the burden of proof to the government once Respondents demonstrated that "the state has a

---

[8] Similarly, in *Patrick* v. *Burget*, the Court, observing that "[t]he mere presence of some state involvement or monitoring does not suffice," held that state action immunity could not be predicated upon a showing that Oregon health officials had licensing authority over the defendent physicians and that Oregon courts had some authority to review private peer group decisions on procedural grounds. 108 S. Ct. at 1663. Rather, a peer group decision would have been "actively supervised" by the state only if a state official or state court had, *and had exercised*, authority to review the mertis of the peer group decision at issue. *Id*. (emphasis supplied). Of course, this reasoning is consistent with the earlier cited language that there must be a "program of supervision."

regulatory system that is capable, at least on its face, of examining critical aspects of the rate making process." CCAB at 78, quoting ID at 94. Complaint Counsel complains that this standard forces it to prove a negative, a difficult task given the dearth of documentation that intrinsically exists in states that do not actively supervise.

The Supreme Court's decision in *Patrick* v. *Burget* holds that the proponent of the state action defense has the burden of demonstrating the actual exercise of regulatory authority by state officials. 108 S. Ct. at 1663 ("respondents . . . have [not] succeeded in showing that any of these actors reviews—or even could review—private decisions regarding hospital privileges"; "respondents have not shown that the [Board of Medical Examiners] in practice reviews privilege decisions"). We therefore conclude that the ALJ's evidentiary ruling was in error, and that Respondents, as the proponents of the state action defense, failed to meet the burden of demonstrating that state officials engaged in an affirmative, substantive review of their rate proposals. We think that Respondents' defense was not prejudiced by the ALJ's erroneous ruling. Both parties' introduction of evidence and examination of the witnesses at the administrative trial elicited more than adequate testimony upon which to base our decision.

We now turn to an examination of the individual states' supervision of the activity at issue.

C. INDIVIDUAL STATES AND ACTIVE SUPERVISION

1. Connecticut

The ALJ found no active supervision in Connecticut. He based his decision on a finding that the state officials had readily identified aspects of collective ratemaking that they themselves considered crucial but which were not being supervised at all. The ALJ found that collectively-filed rate increases were submitted with general justifications

that related merely to insurer profits. There was no critical examination of what lay behind those profit figures. "Most significantly, there was no showing that Connecticut even had the wherewithal to probe into the critical area of insurer expenses, especially the impact on the level of rates of the so-called agent retention or 'commission expense' and the cozy relationship between insurers and attorney-agents that fuels this expense." ID at 97. In fact, the state insurance commission believed it was statutorily barred from doing anything about this. Thus, the state regulators "cannot and did not, review, monitor, or examine in any meaningful sense the very factor that its insurance regulators had identified as crucial in ratemaking." ID at 97.

Respondents argue that the ALJ's "critical aspects" standard impermissibly and inappropriately second-guesses the qualities of supervision. RAB at 7. (The same argument is made as to Wisconsin, discussed *infra*.) Respondents state that a central goal of the state action doctrine "is to preserve for the states maximum flexibility in economic regulation." RAB at 8. Respondents admit, however, that "a state cannot simply authorize private parties to violate the federal antitrust laws . . ." RAB at 8. But Respondents argue that *Southern Motor Carriers* cited with approval the Areeda-Turner treatise which pointed out, in part, that "[t]he federalism concerns at the heart of *Parker* cannot be reconciled with federal court probing of the 'true' motives of state legislatures and agencies." RAB at 9. "There simply is no way to tell if the state has 'looked' hard enough at the data . . ." RAB at 10.

Respondents assert that the record demonstrates that there was an appropriate regulatory mechanism in place in Connecticut. RAB at 16. Even if any federal scrutiny of state supervision beyond ascertaining the existence of a regulatory mechanism is permissible, "that scrutiny should

be limited to a 'quick look' by the federal agency or court . . .". RAB at 19. A "quick look" in Connecticut assertedly demonstrates active involvement. Respondents then recite various facts that they believe show active supervision under the "quick look" test. RAB at 19-30.

Complaint Counsel argues, on the other hand, that when the rating bureau filed its first rate manual in 1966, it did not file statistical data to support the collectively-set rates.[9] CCAB at 109. Requests for clarification by the state regulators were not fulfilled. Nonetheless, this rate filing was effective until 1981.

Complaint Counsel asserts that the 1981 rate filing did not contain information from which the department could assess the reasonableness of insurer expenses. A 1983 filing was approved immediately, despite the fact that it lacked the supporting data required by statute.

Moreover, numerous endorsements and amendments were filed without supporting cost justifications. CCAB at 110. Although agreeing with the ultimate finding of liability by the ALJ, Complaint Counsel disagrees with his finding that minimal review was sufficient for "ancillary" filings such as these. F. 130 n.192. Complaint Counsel contends that the department did not consider these endorsement filings to be minor or ancillary. CCAB at 111 n.137. Charges of over $100 per endorsement were not uncommon. Respondents even allegedly characterized one of the endorsement filings as "significant." RAB at 22. A minimal review standard is insufficient, according to Complaint Counsel. Finally, Complaint Counsel argues that the state did not have the "wherewithal" to examine

---

[9] We preface our examination of Complaint Counsel's argument by rejecting Complaint Counsel's proposed method for analysis as to all states insofar as it relies on its standard loosely based upon the Administrative Procedure Act. *See* our discussion in *New England*, ____ FTC at ____, slip op. at 15-16 n. 14.

insurer expenses, citing DiSanto Testimony 2739-40 and 2793.

In reply, Respondents argue that the 1966 rate filing was examined and the rating bureau responded to all inquiries. RRB at 39, RX 104 through 110. Respondents also contend that the other filings similarly were examined and proper justifications were filed.

The Commission finds that Connecticut did not meaningfully examine the rates submitted because it did not have the "wherewithal" to examine the critical area of insurer expenses. ID at 97, ID at 53-55. We adopt the ALJ's findings that the state insurance department suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates. F. 130, 132-33. For example, the ALJ found "no evidence that the department's request for justification relating to [the 1966 rate filing] was ever answered satisfactorily." F. 130. Further, the ALJ found that the state insurance official conceded that the department lacked the authority to control insurer expenses they knew were excessive. ID at 53-55.

The fact that the state regulators could not meaningfully regulate a critical component of the ratemaking process is fatal in and of itself to Respondents' state action defense. As the Supreme Court stated in *Patrick v. Burget*, the "mere presence of some state involvement or monitoring does not suffice." 108 S. Ct. at 1663. The Court's concurrent citation of *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345, n.7, is instructive. In *Duffy*, the Court held that certain forms of state scrutiny of a restraint established by a private party did not constitute active state supervision because they did not "exer[t] any significant control over" the terms of the restraint. *Id.* Accordingly, when the state regulator responsible for implementing the statutory scheme admits a lack of significant control over the restraint in question, the rates are the product of private action and the state action defense is inapplicable.

However, we disagree with the ALJ that so-called "ancillary" filings receive some sort of exemption or lower standard under the *Midcal* test. Since there is no *de minimis* exception to the antitrust laws for price-fixing, the ALJ's minimal review standard for endorsements and amendments is contrary to the law. These were separate filings that should have been accorded state review. Although the use of scientifically sound sampling techniques to examine a rate filing might be reasonable, simply ignoring some filings because they do not involve generalized rate increases is impermissible. There must be a "program of supervision," not hit-and-miss review.

In sum, we conclude that the state of Connecticut did not actively supervise the rate filings at issue, and the state action defense does not apply. Respondents' arguments that in order to find a state action defense we should take merely a "quick look" at the state's regulatory supervision or be satisfied merely that any regulatory mechanism is in place, are put to rest by *Patrick v. Burget*. As discussed generally above, we must determine whether the state actually exercised its authority. The state did not do so here.

2. Wisconsin

The ALJ found no active supervision in Wisconsin. He stated that there "is little evidence that these [latent powers possessed by the insurance commissioner] were used to influence bureau rate making." ID at 55. "To illustrate, while the insurance commissioner was required to examine the Wisconsin Rating Bureau at regular intervals, no examination was ever made." ID at 55. Further, "no hearing has ever been held in Wisconsin on *any* insurance rate filing, and no rate suspension order has ever been issued." ID at 55. Essentially, "Wisconsin followed a hands-off policy in dealing with title insurers." ID at 97.

The 1971 rates, which represented historical rates charged before the formation of the bureau, were ap-

proved although supporting justifications were not filed until 1978. ID at 57. The 1981 filing, which represented a substantial rate increase of 11 percent, was accompanied by supporting data that was checked only for accuracy. The Office of the Commissioner of Insurance made no inquiry into insurer expenses, "notwithstanding recognition by the state office that title rates cannot be effectively regulated without such a [sic] scrutiny." ID at 58. A 1982 filing was given a "cursory reading," and the supporting materials "were not even checked for accuracy before the rate increase was accepted." ID at 59.

Respondents assert that as to the 1971 filing, the insurance department stated it would accept the filing contingent upon submission of a statistical rate justification when the rating bureau gained more experience in title insurance. RAB at 32. The state questioned the rating bureau "frequently" about its rate justification methods. RAB at 33. Eventually, the rating bureau hired an economic consultant. RAB at 33. As to the 1981 rate filing, Respondents contend that rating bureau and state insurance officials discussed the filing extensively. RAB at 36. The 1981 filing was "checked for mathematical accuracy," the proposed rates were compared with rates in neighboring states, and the effect on total revenues was analyzed. RAB at 36. Respondents argue that insurer expenses were examined. RAB at 38. For example, expense data was looked at. Transcript at 1777.

Complaint Counsel argues, in turn, that the first rate filing was in effect for over seven years without any supporting justification being provided. CCAB at 117. The department's review of the 1981 filing merely looked for mathematical accuracy. Mr. Wirtz of the insurance department admitted that the department did not have the resources to conduct reviews of rates to determine whether they were reasonable. F. 144. Wirtz Testimony at 1785-86.

The rating bureau also filed numerous endorsements and amendments between 1976 and 1984. CCAB at 121. No supporting cost information was provided for any of these amendment and endorsement filings. Nor was there any review of these filings. F. 142 n.217.

The Commission concludes that a law violation finding as to Wisconsin rests on several grounds. As with Connecticut, the state insurance department did not examine insurer expenses. A key official of the state testified as follows:

> Q. Now, the department didn't have any idea what an efficient company's expenses would be for search and examination services?
>
> A. No.
>
> Q. But it is your opinion that you would really have to study the search and examination expenses of the individual companies in order to effectively regulate the charges for search and examination expenses?
>
> A. Yes.[19]

Respondents' generalized assertions of review do not withstand scrutiny. We adopt the ALJ's evaluation that Wisconsin followed a "hands-off policy in dealing with title insurers." ID at 97. For example, the 1971 filing was in effect for seven years prior to the filing of any justification.

Inherent in the active supervision criterion is the notion that the review be meaningful. If review is not meaningful because a state regulator fails or is unable to evaluate whether rates are "reasonable" as required by statute, then the rates are the product of private and not state action:

> And again, it was a state official [in Wisconsin] called by respondents who readily acknowledged that insurer expenses were simply not examined although the state recognized how critical those expenses were in rate making. ID at 97-98.

[19] Wirtz Testimony at 1778-1779. *See* ID at 58.

For example, checking rates merely for mathematical accuracy under a statute that provides that rates must be reasonable is insufficient supervision. Further, nearly two dozen endorsements and amendments went into effect without being examined at all. However, even if the economic effects of these changes were not substantial, there is no *de minimis* exception to the antitrust laws.

3. Arizona

The ALJ found that while the state insurance department had a wide range of latent regulatory powers, the actual use of these powers was more hypothetical than real. F. 147-48. Between 1968 and 1981 the insurance department conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years. F. 148. The ALJ found that there were "minor rate amendments, adjustments, and endorsements filed throughout the period 1968 to 1980 . . ." F. 152. He advised that "[t]here is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject." ID at 61, n. 233.

A 1968 rate filing brought an inquiry from the state as to how the risk component of the filed rate was derived, but there was "no convincing evidence that the rate was either justified by the bureau or reviewed by the state." ID at 61, n. 233. It appears that the 1968 rate, used from 1968 to 1983, apparently represented the rates charged by some members before the bureau was formed. *Id.*

However, on November 3, 1980, the Arizona Department of Insurance announced that a broad investigation of the rating bureau would be conducted. Before the investigation could be completed, a federal civil complaint challenging the propriety of the collective fixing of escrow rates was filed by the United States. The ALJ did not believe there were adequate grounds for questioning state supervision, notwithstanding Arizona's apparent willingness to accept with little or no justification (under its "deemer" statute) prevailing rates that were simply adopted by the rating bureau. He thought that the state validly was involved in what it considered to be a more immediate problem – the rating bureau's attempt to raise and then engraft collectively-set escrow fees onto the existing rate structure. He also believed it unseemly for a federal agency to second-guess Arizona's supervision priorities when the federal government's own investigation of title insurance in Arizona in 1980 zeroed in on escrow rates. ID at 98. Consequently, the ALJ accepted the state action defense in Arizona.

Respondents agree with the ALJ that active supervision was present in Arizona. Disputing Complaint Counsel's chronology of events, Respondents state that the 1968 rate filing was "supportable under express statutory language permitting rates to be justified on the basis of the experience of the filing title insurer or rating organization or other title insurers," RRB at 29, citing Ariz. Rev. Stat. Ann Section 20-377. Respondents note that the rating bureau hired an accounting firm to compile industry statistics beginning in 1971; the state insurance department requested these reports in 1977. RRB at 30. The rating bureau hired a rate consultant in 1977 and consulted with the Director of Insurance "and developed financial and statistical reporting plans for TIRBA members and sub-

scribers." RRB at 30. "By the end of 1978, ADL [consultant Arthur D. Little] had drafted its first profitability analysis of the Arizona title insurance industry, covering the years 1972-77 . . . and had submitted to the Director complete financial and statistical reporting plans, and financial reports for the years 1972 through 1977. RRB at 31. Other reporting and review processes are detailed by Respondents. RRB at 32-35.

Respondents also argue that the doctrine of *res judicata* bars the requested relief. In 1980, the Department of Justice filed a complaint alleging that filing of rates for escrow service by Title Insurance Rating Bureau of Arizona, Inc., (TIRBA) violated Section 1 of the Sherman Act. *See United States v. Title Insurance Rating Bureau of Arizona, Inc.*, ("TIRBA"), 700 F.2d. 1247 (9th Cir. 1983). Respondents argue that the respondents in the instant proceeding were members of TIRBA and subject to the judgment finding liability in that case. The United States is also a party to both actions. The *res judicata* doctrine prohibits splitting a cause of action:

> A party seeking to enforce a cause of action must present to the court, either by pleading or proof, or both, all the grounds upon which such cause of action is predicated. He is not at liberty to split up his demand and prosecute it by piecemeal or to present a part of the grounds upon which such cause of action is founded and leave the rest to be presented in a subsequent suit . . ." RRB at 36.

Respondents thus argue that the United States has initiated a second lawsuit under the same price-fixing theory used in *TIRBA*. The government may not now attempt to enlarge the relief it obtained in the original action or subject the insurers to additional claims that it could have pursued then. RRB at 36.

Complaint Counsel argues that there was no active supervision in Arizona. The March 1968 filing was filed without any supporting data. From 1968 to 1981 the rating bureau submitted numerous rate changes and endorsement filings, none of which contained any cost or expense data. Complaint Counsel states that in Arizona title insurance rates become effective 15 days after they are filed if the insurance department takes no action—they are "deemed" to meet the requirements of the statute. The 1968 filing was allowed to become effective in this manner. CCAB at 83. The president of the rating bureau recognized that the department of insurance, which was then in a transition period, "accepted the filing without any question and without any justification thereof." CCRB at 29. The state insurance official admitted that no review was conducted between 1973 and 1982. Barberich Testimony at 2289. The department head also could not recall any specific department review of various amendments. Accepting prevailing rates is not permissible, Complaint Counsel argues, for it is no excuse that the prices fixed are themselves reasonable, citing *Catalano Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). *See also United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).

Complaint Counsel also contends that whatever supervision occurred with regard to collectively-set escrow fees does not, as a matter of law, remedy the lack of active supervision over price-fixing for search and examination services. CCAB at 86. Further, Complaint Counsel argues that, as in Wisconsin and Connecticut, the state did not examine crucial aspects of the ratemaking process, i.e., insurer expenses. CCAB at 87.

Complaint Counsel also asserts that *res judicata* does not bar relief in Arizona. "Respondents interpret the doctrine of *res judicata* and its rule against splitting a cause of

action to mean that once defendants have been found guilty of price-fixing for one product or service, they become insulated from attack with respect to any other contemporaneous price-fixing that could have been raised in the first action. This contention is wrong." CCRB at 32. Complaint Counsel believes that the doctrine against splitting a cause of action prevents bringing multiple lawsuits using different legal theories to remedy the same wrong. CCRB at 33. This case assertedly does not involve use of a different legal theory to remedy the same wrong, i.e., price-fixing on escrow services. This is a different wrong—price-fixing on search and examination services.

The Commission finds a violation of Section 5 of the FTC Act as to Arizona because there was no active supervision. The Commission also finds that the doctrine of *res judicata* does not bar this lawsuit. First, between 1968 and 1981 the insurance department conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years. F. 148. No active supervision can be said to exist when a state agency does not even carry out the bare minimum of statutory duties entrusted to it. The ALJ found that there were "minor rate amendments, adjustments, and endorsements filed throughout the period 1968 to 1980 . . ." F. 152. He advised that "[t]here is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject." ID 61, n.233. As stated above, there is no *de minimis* exception to the antitrust laws. While the record is said to be inconclusive on the kind of review, if any, that occurred, the burden of establishing this defense was on Respondents. *See* discussion of proponent's burden, *supra*, as set forth in *Patrick v. Burget*, 108 S. Ct. at 1663.

Although a 1968 rate filing brought an inquiry from the state as to how the risk component of the filed rate was derived, there was "no convincing evidence that the rate was either justified by the bureau or reviewed by the state." ID at 61, n.233. It appears that this rate, used from 1968 to 1983, represented the rates charged by some members before the bureau was formed. *Id.* Even if one assumes the historical rates were reasonable, this is not a defense under *Catalano* and related cases. A state may not merely allow private parties to fix prices without active state supervision. When a state allows a historical rate to go into effect unexamined, it has done just that.

Nonetheless, the ALJ accepted the state action defense because the state was involved in the rating bureau's attempt to raise and then engraft collectively set escrow fees onto the existing rate structure. ID at 61-63, 96. We disagree. A state may not pick and choose which classifications of rates it is going to supervise actively and which it will ignore. There must be a "program of supervision," under which the state actively supervises all types of rates. "The mere presence of some state involvement or monitoring does not suffice." *Patrick* v. *Burget*, 108 S. Ct. at 1663.

The lack of active supervision can be seen in a variety of instances. For example, Respondents state that the rating bureau hired an accounting firm to compile industry statistics beginning in 1971. Yet the fact remains that the state insurance department requested these reports only in 1977. RRB at 30. The rating bureau hired a rate consultant in 1977. But it was not until the end of 1978 that the consultant had drafted the first profitability analysis of the Arizona title insurance industry, covering the years 1972-77. Thus, there was a substantial time during which there could not have been active supervision. For example, while the original rates were filed in 1968, the rating

bureau did not even begin to initiate a submittal process until hiring outside help in 1971.

Further, in Arizona title insurance rates become effective 15 days after they are filed if the insurance department takes no action – they are "deemed" to meet the requirements of the statute. The 1968 filing was allowed to become effective in this manner. CCAB at 83. The president of the rating bureau recognized that the Department of Insurance, which was then in a transition period, "accepted the filing without any question and without any justification thereof." CCRB at 29. This lack of substantive review does not comport with the *Midcal* active supervision requirement.

We hold also that the doctrine of res judicata does not bar the Commission's action as to Respondents' activities in Arizona. Respondents argue that "the United States has initiated a second lawsuit under the same price-fixing theory relied upon in *TIRBA*, premised upon the same rate filing activity by the same rating bureau during the same period." RRB at 37. This argument is based on an erroneous recitation of the facts.

"In general, the doctrine of res judicata serves the interest of judicial economy and finality in disposition of disputes by precluding parties to a judgment and their privies [footnote omitted] from relitigating the same 'cause of action.' " *Durhan v. Neopolitan*, No. 88-2108, slip op. at 5 (7th Cir. April 20, 1989). In order to determine whether res judicata applies because of the final *TIRBA* order concerning escrow fees, we must decide if the cause of action which is asserted in the instant case is the same cause of action that was advanced in *TIRBA*.

Federal courts increasingly have adopted a "transactional" analytical approach to res judicata.[11] *Durhan v.*

[11] This is in comparison with the "proof" or "evidence" approach, under which a second action is barred where there is identity of facts essential to the maintenance of both cases. "Under most factual set-

Neopolitan, slip op. at 6. In the Restatement (Second) of Judgments § 24 (1982), causes of action are the same if they arise from the same "transaction" or "common nucleus of operative facts." *Id.* § 24 at 199[12]. "Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." *Id.*

The record shows that the activity at issue here is separate in time, space, origin and motivation from the activity at issue in *TIRBA*. As to the instant case, the 1968 rate filing involving search and examination rates was in effect from 1968 to 1983. Wilkie 2074-77, ID at 61, n.233. The 1968 rate filing for search and examination rates had as its basis "a meeting or series of meetings" (prior to the 1968 filing) involving all the companies issuing title insurance policies. Wilkie 2113. Yet, there was no convincing evidence that the 1968 rate filing was either justified by the rate bureau or reviewed by the state before it went into effect. ID at 61, n. 233. *See also* Wilkie 2112.

In comparison, it was not until 1977 that the title insurance code of Arizona was amended to include escrow services, the type of services at issue in *TIRBA*. Wilkie at 2090-91. The escrow rates were first filed in 1977 in reaction to that legislative change. Wilkie 2107, 2121; Barberich 2266. By then, the search and examination rates at issue herein had been in effect for almost a decade. When

tings, the transactional approach will result in broader preclusive effect since several theories of recovery may emanate from the same transaction without complete identity of the evidence necessary to sustain each theory." *Durhan v. Neopolitan*, slip op. at 6.

[12] The Supreme Court, among others, has referred with approval to the conceptual framework of the Restatement (Second) of Judgments § 24 (1982). *See Nevada v. United States*, 463 U.S. 110, 130, n.12.

the 1977 escrow filing was submitted, it was a separate schedule from the search and examination schedule. Wilkie 2132. And when the escrow schedule was refiled as amended in 1978, the search and examination rate structure stayed the same. Wilkie 2099.

These facts show that the Respondents' activities as to escrow fees and search and examination fees are not so related in time, space, origin or motivation as to justify preclusion of the Commission's lawsuit. For example, the period during which the Respondents agreed to submit collective search and examination rates predated the filing of escrow rates by about a decade. The search and examination rates were permitted to go into effect and remained in effect in the absence of active supervision for many years prior to the legislative change that led to the collective filing of escrow rates. And when the escrow rates were filed, there was no effect on the search and examination rate structure. We conclude, therefore, that the doctrine of res judicata does not bar the Commission's lawsuit in Arizona as to search and examination fees.

4. Idaho

The ALJ found active supervision in Idaho. He stated that the rating bureau was financially audited by the state insurance department. F. 164. A 1975 rate filing was referred to the department's outside consultant, who provided an analysis. F. 168. The state insurance department also held a public hearing on a variety of matters such as minimum rates. F. 168. A 1980 across-the-board rate increase resulted in the department subpoenaing data from the bureau members relating to insurer expenses and the outside consultant analyzing data. F. 168. The ALJ found that there was "no convincing evidence that the Idaho Insurance Department has failed to consider any insurer expense which might impact on rates, including agent retention expense." F. 169. We note, however, that the ALJ

found that "[m]iscellaneous rate adjustments, forms, and endorsements were filed and approved throughout the period 1974-84 with apparently little or no review by the insurance department." ID at 68, n. 259, citing Mitchell Testimony at 2925-39, Fraundorf Testimony at 3434-42, CX 62A-71B and RX 207-223.

Respondents generally agree with the ALJ's analysis. Respondents state that Complaint Counsel's "preoccupation with the Bureau's filings of miscellaneous forms and endorsements and specialized policies is . . . misguided." "Complaint Counsel's implication that lack of recall, years after the fact, suggests lack of regulatory supervision, is specious. Moreover, Complaint Counsel have made no showing that these endorsements had any real economic impact on title insurance consumers or companies." RRB at 51.

Complaint Counsel argues, however, that "an official of the rating bureau conceded at trial that the department had not conducted any inquiry into the reasonableness of the title insurers' expenses which were used as the basis for filing the rate increase." CCAB at 104, citing Mitchell Testimony at 2924. Complaint Counsel also argues that numerous endorsements and amendments were filed, CCAB at 104, and were approved almost as soon as they were filed, in violation of the statutory 30-day waiting period, and despite the fact that they were unsupported by any justification data. "The department's analyst who approved the rates testified that he was unaware of what work a title insurer had to perform before the various endorsements could be issued. In addition, he was unaware of the costs or revenues associated with issuing any particular endorsement." CCAB at 104-05. Thus, Complaint Counsel argues, a $25 charge for issuance of a variable rate mortgage endorsement (which had been rejected in Connecticut because it represented a 25 percent increase in

the cost of a $50,000 mortgage title insurance policy, without providing any apparent additional coverage) was accepted in Idaho "without any justification and without any questions or review by the department." CCAB at 106.

Commissioners Strenio and Calvani would find that liability exists in Idaho because of the state's failure to actively supervise the filing of endorsements and amendments.[11] Complaint Counsel argues persuasively that there was no review of these filings and, as held above, there is no *de minimis* exception to the Sherman Act. While sampling techniques used within rate filings may be permissible, a state reviewing agency may not unilaterally exempt an entire category of filings from its scrutiny. In effect, the state here was saying that it would actively supervise rates for apples but not for oranges. Perhaps its rationale was that the endorsements were less significant economically. However, when a per se violation of the antitrust laws for price-fixing is involved, one need not judge economic import, *e.g.*, whether the fixed rate is reasonable. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). One is not required to evaluate whether a fixed price on what may be a small item crosses some threshold of economic concern. There is no necessity to make a "minute inquiry" into the substantial nature of a fixed price. *Id.*

5. Montana

The ALJ found that the Montana Rating Bureau made only one major rate filing, in 1983. "[The] bureau's filing included a commitment to gather statistical data and

[11] The Commission was evenly divided on the finding of liability as to Idaho. Under the circumstances, the Commission has determined to dismiss the complaint allegations as to Idaho. The reasoning in this paragraph is adopted only by Commissioners Strenio and Calvani. See the separate statement of Commissioner Azcuenaga.

undertake a profitability study for all underwriters and agents in Montana during the year 1984 in order to provide further support for the rate." F. 176. "In connection with the February 22, 1983 filing, a representative of the Montana Rating Bureau met with officials of the Montana insurance department, and apparently was told that while the increase would go into effect immediately, additional support would have to be provided in the form of financial data showing the profitability of agents and insurance companies for the past six years. There is no evidence that this material was ever provided." F. 177. The ALJ found, however, that "Montana insurance officials examined agent retention expenses both before and after the creation of the Montana Rating Bureau, and there is no evidence that the state's method of dealing with the problem, *i.e.*, by giving the insurance commissioner specific authority to disapprove excessive rates, has been ineffectual." F. 178. Montana also had a statutory provision permitting "file and use" rates. F. 174.

The ALJ found also that in Montana, "where there has been a history of state involvement in the controlled business and agent commission problems (culminating in specific legislation giving the insurance commissioner authority to review and reject excessive commissions), there is inadequate basis on this record for questioning state supervision during the brief existence of the rating bureau." ID at 96.

Respondents state that the 1983 rate filing, upon which Complaint Counsel focuses, "was personally reviewed and accepted for filing by a Department official in charge of title insurance rate filings." RRB at 52. "The Department concurred in MTISO's [the rating bureau] plan to supply additional financial data on title insurance industry profitability to supplement the information presented in the rate filing." RRB at 53. Respondents argue that the 1983 rate

filing "was, in fact, supported by information discussing the declining profitability of the title insurance industry." RRB at 53. "The filing conveyed MTISO's plan for developing additional data that would allow the Department to reexamine the rates filed." *Id.*

Complaint Counsel states that in Montana, title insurance rates can be used as soon as they are filed.

> In line with this hands-off approach to regulation, from 1974 to November, 1984, the insurance department had only one full-time employee in the Rates and Forms Section of the Property and Casualty Division, and that employee was responsible for all rate and form filings in all property and casualty lines of insurance as well as in miscellaneous other lines, such as title insurance. As the evidence illustrates, that employee's duties did not involve substantive rate review; only insurance forms had to be approved. CCAB 89.

The 1983 rate filing "was stamped approved in Mr. Stratton's [director of the title insurance rating bureau] presence without any discussion of the rates it contained." CCAB at 89. Complaint Counsel also argues that the "filing on its face acknowledged that it did not contain the support material required by statute . . ." CCAB at 89. "The supporting material was never provided." CCAB at 90.

Complaint Counsel argues that the controlled business hearings and the enactment of a new statute, relied upon by the ALJ, cannot support a finding of active supervision. Controlled business hearings, which were held three years before the formation of the rating bureau, involved hearings on restrictive legislation designed to keep controllers of business—attorneys, real estate brokers, and lending institutions—out of the title insurance business. Complaint Counsel argues that such hearings cannot substitute for supervision of the price-fixing in question.

The Commission concludes that Complaint Counsel has the better of the argument and finds no active supervision in Montana. For example, the record demonstrates that rates from the 1983 filing went into effect without being examined. F. 177. There is no evidence that the additional data requested by the state was ever provided. *Id.* This does not constitute a "program of supervision." The state's subsequent enactment of legislation cannot cure the legal violation that occurred earlier. Otherwise, states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated a federal statute.

6. Ohio

In Ohio, the ALJ found that Complaint Counsel failed to prove the complaint allegation that Respondents used the rating bureau to establish uniform charges for search and examination services. Between 1972 and 1983, all rates filed by the Ohio rating bureau covered "risk" only. None of the filings purported to contain charges for search and examination services or settlement services. F. 158. Respondents independently set and published charges for the latter and they were not submitted to the Ohio Department of Insurance. F. 160. Complaint Counsel's entire case on the search and examination issue rested on the supposition that because "risk" rates were justified on the basis of rate of return on total capital they must of necessity be inflated to include such non-risk elements as the cost of conducting search and examination and settlement services.

Respondents argue that if the settlement charges and the search and examination charges assessed independently by Respondents actually covered the expenses associated with delivering such services, then the subsidization theory

urged by Complaint Counsel "disintegrates." RRB at 57. "Since Complaint Counsel did not even attempt to prove that the revenues from search/examination and settlement persistently failed to cover the expenses of providing such services, their theoretical argument about the multifaceted role of the risk rate in Ohio has no record support." RRB at 58.

Complaint Counsel's challenge to Respondents' conduct is that Respondents used the collectively-set risk rate as a vehicle to obtain their desired level of profit on all their activities. The collectively-set risk rates filed with the insurance department were established by the rating bureau through a rate of return on total capital method of accounting. Under this method, the capital, revenues and expenses used to compute the risk rate include capital, revenues, and expenses attributable to "nonrisk" activities, "by far the most important of which are search and examination services and settlement services." CCAB at 94. Thus, the rating bureau determined what increases to file in the collectively-set risk rates by calculating how much additional revenue was necessary to achieve a targeted rate of return on total capital for all of its members' Ohio operations. "The 1981 rate filing was designed to assure the title insurance industry a rate of return on total capital of 7.52%." "Although this price-fixing agreement did not result in uniform charges for search and examination and settlement services, the agreement clearly had a substantial impact on competition in those markets." CCAB at 96.

The Commission finds that there is no liability in Ohio. Although Complaint Counsel's argument has theoretical appeal, Complaint Counsel failed to establish a nexus, other than on a theoretical basis, between the collective filing of risk rates and the fees for search and examination and settlement services.

D. ESCROW AND SETTLEMENT SERVICES

The ALJ states that it "became apparent at the outset of this proceeding that the complaint allegation respecting settlement or escrow services was an ancillary issue." ID at 3. "[B]oth sides directed their efforts almost exclusively to the search and examination issue."

We hold that the complaint should be dismissed in its entirety as it relates to settlement or escrow services. The ALJ is correct that little attention was paid to this aspect of the complaint. Indeed, Complaint Counsel did not clearly appeal the ALJ's adverse rulings in this area. Thus, we conclude that no case has been made as to these services.

IV. BUSINESS OF INSURANCE

Broadly stated, the Commission also must determine whether Respondents' business was the "business of insurance" and therefore exempt from antitrust challenge under § 2(b) of the McCarran-Ferguson Act, 59 Stat. 34, as amended, 61 Stat. 448, 15 U.S.C. § 1013(b). The initial decision describes Respondents' "insurance" activities in full detail and also analyzes the general activities of the title insurance industry. We adopt this description by the ALJ and also conclude that Respondents' collective rate setting for search and examination services is not exempt from antitrust challenge. We highlight some of the more pertinent facts below.

Preliminarily, it is important to understand the nature of the antitrust exemption at issue. The statutory exemption itself has been discussed in detail by the Supreme Court in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and also has been applied by the Supreme Court in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

In *Group Life & Health Ins. Co. v. Royal Drug Co.*, the Supreme Court, after noting that antitrust exemptions are to be construed narrowly, stated that the exemption is for the "business of insurance," not the "business of insurers." Referring to *SEC v. National Securities, Inc.*, the Court noted:

> The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. *SEC v. National Securities*, 393 U.S. 453, 459-60 (emphasis in original.)

In *Royal Drug*, the Supreme Court adopted a three-pronged test. Whether a particular practice is the business of insurance depends first on whether the practice has the effect of transferring or spreading a policyholders' risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *See also Pireno*, 458 U.S. at 129.

The Supreme Court noted, with regard to the first prong, that the "primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk." *Royal Drug*, 440 U.S. at 211. " 'It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.' " *Id.* (citation omitted). Underwriting or spreading of risk was said to be "an indispensable characteristic of insurance . . .". *Id.* at 212.

The Pharmacy Agreements in *Royal Drug* were not part of the business of insurance because they did not "involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield." *Id.* at 214. The Court, agreeing with the United States position that "there is an important distinction between risk underwriting and risk reduction . . .", *id.* at 214, n.12, noted that the cost savings arrangements at issue "may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the 'business of insurance.' " *Id.* at 214. Thus, the Pharmacy Agreements were held to be legally indistinguishable from "countless other business arrangements that may be made by insurance companies to keep their costs low" such as a contract between the insurance company and a drug chain whereby its policyholders could obtain drugs under their policies only from stores operated by the chain. *Id.* at 215.

As to the second prong, regarding the policy relationship between the insurer and the insured, the Court noted that Congress, in enacting the McCarran-Ferguson Act, had been concerned with the " 'relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these were the core of the "business of insurance." ' " *Id.* at 215-16, quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). As to the Pharmacy Agreements in question, the Court stated:

> At the most, the petitioners have demonstrated that the Pharmacy Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But in that sense, every business decision made by an insurance company has some impact upon its reliability, its ratemaking, and its status as a reliable insurer . . . *Id.* at 216-17.

As to the third prong, whether the practice was limited to entities within the insurance industry, the Court referred extensively to the Act's legislative history, noting that in enacting McCarran-Ferguson, "the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id.* at 221. This was attributed to the "widespread view that it [was] very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation." *Id.* The Court adopted the explanation from one of the early House Reports that "[t]he theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." *Id.* at 221, quoting H.R. Rep. No. 873, 78th Cong., 1st Sess., 8-9 (1943). Further, the Court noted an underlying rationale for the exemption was that to "prohibit combined efforts for statistical and rate-making purposes would be a backward step . . .". *Id.* at 221-22 (citation omitted).

In *Union Labor Life Ins. Co. v. Pireno, supra*, the Supreme Court reconfirmed the three-pronged test from *Royal Drug*. The Court held that the arrangement in question between an insurance company and a number of chiropractors was not part of the business of insurance since the practice was aimed at reducing the cost of satisfying claims, not spreading risk. Also, the Court explained that the practice must be "logically and temporally" connected to the spreading of risk. 458 U.S. at 130.[14]

[14] In addition to these Supreme Court decisions, a Court of Appeals addressed the conduct of Respondents herein in a similar context in

Turning now to Respondents' arguments, they assert that the ALJ improperly relied upon just the first "risk spreading" *Royal Drug* criterion in ruling on the business of insurance exemption issue.[15] RAB at 45. They cite *Pireno* for the proposition that "[n]one of these criteria is necessarily determinative in itself." 458 U.S. at 129. Respondents argue that the McCarran Act exemption may apply where the second and the third criteria are satisfied but the first is not.

Respondents then argue that in any event, the search and examination process in title insurance satisfies the first "risk spreading" criterion. They cite *Pireno* for the proposition that the "fundamental principle of insurance [is] that the insurance policy defines the scope of the risk assumed by the insurer from the insured." 458 U.S. at 131. In title insurance, this role of identifying the risk to be insured is performed through the search examination. "Since every real estate title is unique, an insurer cannot reliably assess on an actuarial or statistical basis whether the purchaser will be vested with a fee simple . . .". RAB at 48. Thus, Respondents think there is a "logical and temporal" relationship between title search and examination and the underwriting of title insurance risk, because the search has to precede the issuance of the insurance. The process of checking and perfecting title is a substitute for the risk; it eliminates or at least minimizes it. RAB at 53, n.44. Respondents would thus conclude that the fees for performing this risk assessment can be set collectively.

Respondents also think the ALJ too narrowly interpreted the legislative history of McCarran. Although the

United States v. Title Ins. Rating Bureau of Ariz. ("TIRBA"), 700 F.2d 1247 (9th Cir.), *cert. denied,* 104 S. Ct. 3509 (1984).

[15] A recitation of Complaint Counsel's arguments would be superflous given our substantial agreement with those arguments.

Supreme Court in *Royal Drug* stated that the primary purpose of the McCarran Act was to permit cooperation in insurance ratemaking, the ALJ concluded that the Act "cannot be interpreted so as to cover insurance company ratemaking that is unrelated to a pooling of risk experience" among insurance companies. ID at 83. Respondents dispute this by citing *SEC v. National Securities,* 393 U.S. 453 (1969) for the proposition that "the fixing of rates is part of this [insurance] business." 393 U.S. at 459.

Respondents then assert that *Royal Drug*, following *National Securities*, stated that there was a dual purpose behind McCarran: the primary purpose was to protect the states' power to tax and regulate insurance against Commerce Clause attack, while the secondary purpose was to carve out a limited antitrust exemption for insurance company activities. RAB at 55-56. Thus, quoting the Supreme Court in *Royal Drug*, the Act "should be read as protecting the right of the States to regulate what they traditionally regulated." 440 U.S. at 218-219, n.18. Further, "[b]ecause of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of . . . [Congress] . . . was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id.* at 221. Respondents assert this language means that insurance ratemaking was an exempt category of conduct wholly apart from the question of risk spreading. RAB at 56, and n.45.

Respondents take the position, however, that they "need not and do not base their McCarran Act arguments on any assertion that the Act constitutes 'a blanket approval of all rate fixing by insurers irrespective of the connection to risk allocation.' " RAB at 58, n. 47. "The activity challenged is ratemaking with respect to an insurance function that is

directly related to the insurer's decision concerning what risks will be assumed under its policies." *Id.*

We now discuss some of the more pertinent facts in the proceeding. We agree with the ALJ's assessment that title insurance policies basically are assurances to the buyer or lender that defects in title discoverable from examining the public record have been brought to the attention of the buyer or lender so they can cure the defect or decide not to go ahead with the deal. ID at 18. A secondary purpose of title insurance, going beyond the scope of an abstract or attorney's opinion,[16] is to protect the buyer or lender from hidden or "off-record" risks not discoverable from examination of public records (such as missing heirs, etc.). ID at 18. But the fees for such protection are separate from the search and examination fees involved herein.[17]

A title insurance policy may be based on a search and examination conducted by an independent abstractor or an unaffiliated independent attorney. ID at 19. Most title insurance policies, though, involve searches and examina-

[16] An attorney's opinion is a substitute in many states for title insurance, especially in New England and the Southeastern U.S. ID at 18, n.53. The attorney's opinion, like title insurance, involves a critical review of the public records and an interpretation of the legal significance of documents uncovered in the search. ID at 15.

[17] An exceptions schedule to the title report or title policy will contain "off-record" exceptions, meaning the insured will not be covered under those conditions. For example, excepted from coverage will be "[r]ights or claims of parties in possession not shown by the public records" or "[e]asements or claims of easements not shown by the public records." F. 87. Some of these exceptions may be removed by off-record procedures. F. 88. But removal of these off-record exceptions also requires the purchase of extended coverage. F. 88. The charges for extended coverage are not covered by the search and examination fees at issue.

tions made by attorney-agents, approved attorneys[18], or employees of the title insurers. ID at 19. A person may wear more than one hat in this business, e.g., an approved attorney may also function as an unaffiliated independent attorney.

Regardless of the form in which the buyer or lender is assured of good title (e.g., through attorneys' opinion, or title "insurance") the condition of the title is determined by essentially the same search and examination process. Further, the objective is the same under all forms or processes—to uncover significant impediments to ownership. ID at 23. The nature of the search and examination service, then, is to provide a statement of the status or condition of title and to call to the attention of the buyer or lender defects discoverable from the public records. ID at 24. In Respondents' view, this process determines what risks they are willing to "insure." ID at 24.

Respondents' basic argument is that the search and examination undertaken prior to the issuance of the title insurance policy is "underwriting" because it is on the basis of the search and examination that risk is identified and a decision is made whether to accept or reject it. ID at 28. We agree with the ALJ's assessment that this open-ended definition of underwriting is illogical because the search and examination conducted for title insurance purposes is virtually the same as the process used for the purposes of rendering abstracts and attorneys' opinions. Further, regardless of the purpose, search and examination is carried out by a corps of searchers, abstractors, conveyancers, attorney-agents, and approved attorneys who move freely from one form of title work to another, without a perceptible difference in what they do. ID at 29.

[18] Approved attorneys are independent attorneys who have been formally designated by Respondent insurers as qualified to conduct a search and examination. ID at 20.

Respondents' effort to expand the definition of underwriting is unpersuasive because the record evidence is that this is an industry in which standard forms predominate, company manuals prescribe a set routine, and the basic approach of the title insurance business is not to assume any significant risks uncovered by searchers and examiners. ID at 29. The search and examination undertaken prior to the issuance of insurance is intended to provide an accurate search of the public records for title defects, which are to be cured by the insured or excepted from coverage. ID at 30. Thus, we conclude that the search and examination function is not underwriting in the sense of assuming and spreading risk among a universe of insureds. ID at 30. *Cf. Royal Drug*, 440 U.S. at 205.

Instead, the guiding principle of title insurers is to avoid risk. Operating manuals throughout the industry are replete with admonitions that risks are to be excepted from coverage. ID at 30. These operating manuals instruct agents that they must be followed or the agents may be liable for damages. ID at 30, n.109. Standard title reports contain standard limitations in the form of a general notice that the policy will not insure against loss from any title defects listed in an exceptions schedule attached to the report, or any new title defect arising between the date of the report and satisfaction of the standard requirements. ID at 32.[19] The title insurers strictly require their agents and employees to list all enforceable or even doubtful title defects, liens, and encumbrances in the exceptions schedule (called Schedule B). ID at 32.

Respondents claim, though, that agents and employees, as searchers and examiners, exercise underwriting discretion in writing title reports or final policies. However, the

[19] The "standard requirements" are the payment of the purchase price for the property, recordation of the deed, and payment of the title insurance premium.

testimony revealed such "discretion" is limited to insignificant defects such as ancient and patently unenforceable mortgages. ID at 33. This is consistent with the finding that there is no credible evidence that Respondents have incurred any significant losses traceable to the exercise of discretion by searchers and examiners in eliminating minor title defects. ID at 33. Additionally, the insurer-agent agreements and company directives contain explicit requirements that the agent, without discretion, must include all material title defects as exceptions to the policy. ID at 33. The "common rule in the title insurance industry is that enforceable title defects appearing on Schedule B of the title report will inevitably appear as specific exceptions on Schedule B of the final policy unless the insured takes specific steps (for example, payment of mortgage money or posting of bonds to satisfy existing tax or judgment liens) to cure them." ID at 35. *See also* ID at 36-38.

It follows, then, that the most significant "risk" that title insurers face is whatever peril attaches to conducting a competent search and examination of the public record. ID at 38. But this "risk" has nothing to do with the notion of risk as it is commonly encountered in casualty insurance. In the latter, there is a risk that an unforeseen or uncontrollable event will affect the insured. In search and examination work, the risk is that the title searcher will not perform competently. Thus, the event triggering compensation here is something caused by or under the control of the title insurer.[20] Even this "risk" of incompetence (a

[20] *Cf.* the *Royal Drug* Court's definition of insurance: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." *Royal Drug*, 440 U.S. at 221, quoting H.R. Rep. No. 873, 78th Cong., 1st Sess., 8-9 (1943).

"risk" indistinguishable from that incurred by all employers in all lines of enterprise) is reduced, though, by the contractual relationship between insurers on the one hand, and abstractors, independent attorneys, etc. on the other, which places upon the latter liability for negligence in conducting the search and examination. ID at 38.

It is only in a rare number of cases that Respondents may give affirmative coverage if an uncovered title defect is not cured. The risk must be calculable and low, and indemnities or extra premiums are required. Agents and branch employees of title insurers are prohibited from giving such affirmative coverage without prior approval from supervisory or home office staff (and we emphasize that this relates only to a limited set of circumstances). ID at 39, and n.141 at 39. Again, we stress that these rare circumstances properly cannot be subsumed under the search and examination ratemaking at issue since additional fees are charged for such affirmative coverage.

Given these herculean efforts to eliminate risk, it is not surprising that the trial elicited no evidence that any title insurer has incurred any loss by reason of an agent's decision to issue insurance without obtaining prior approval despite the presence of a known title defect. F. 95. Similarly, there is no evidence on the record that in those rare instances when an insurer decides to issue insurance despite the existence of some uncovered risk that this involves a pooling of risk experience or represents an acturial assessment of risk by an individual insurer. ID at 40, F. 114.[11]

[11] *Compare Royal Drug*, 440 U.S. at 221 ("[t]he theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages.") *with* F. 114: "there is no evidence that any title insurer, whether operating through a rating bureau or otherwise, sets rates by referring to actuarially determined loss experience." According to the New Jersey Title Insurance Rating Bureau, "it is not possible to set up an actuarial standard for risk assumption based on loss experience. Risks in the title insurance industry are of too low an incidence and too random a character to justify this type of rate determination." Respondents' Exhibit 3Z-4.

Consequently, there is a sharp distinction between the two things title insurance companies do: (1) provide a service informing buyers and lenders about known title defects, and (2) in a small number of cases indemnify buyers or lenders under separately charged "risk rates." The bifurcated nature of the business is evident from industry rate manuals that separate out a relatively small charge (the "risk rate") for indemnification. ID at 41. The separate risk rate is not challenged in this proceeding (except in Ohio, as discussed *supra*). The risk rate stands in marked contrast to the relatively substantial charge for providing information based on the search and examination. ID at 42.

Significantly, title insurance rates are not set collectively through rate bureaus in order to facilitate intra-industry cooperation in the pooling of risk information. ID at 44. The evidence shows that where a title insurance rating bureau establishes either an inclusive rate or a separate rate schedule for search and examination, the cost studies used to support these rates dwell mainly on the cost of carrying out the search and examination, including the fixed costs of title plants and employees staffs. ID at 44; Plotkin Testimony at 2462. "This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurer, and therefore the basic tenet of the McCarran Act—that is, the presumed need for insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present." ID at 86-87. Uniform rates are established that apply to all members despite any cost dif-

ferences the members individually face when conducting searches and examinations. ID at 44.

The Commission finds that Respondents' search and examination services are not the "business of insurance." Accordingly, the cooperative rate setting in which they engaged regarding those services is not properly exempt from the application of the antitrust laws. We agree with the ALJ's evaluation that search and examination services essentially are non-insurance services often performed by other entities (such as independent attorneys) outside of an "insurance" context. ID at 85. The industry itself separates out the concept of risk by having separate "risk" rates (not at issue herein). Search and examination services "are regarded by respondents themselves as discrete services which are usually billed at a price that is entirely removed from any consideration of whatever risk element may be involved in title insurance." ID at 86.

Our only substantive disagreement with the ALJ is with some of his analysis under the *Royal Drug* standard. The ALJ confined his analysis of the second and third *Royal Drug* criteria to a footnote. ID at 88, n.286. He found that there is no evidence that Respondents extended their price-fixing beyond their own agents and employees. He also ruled that these services (and the charges for these services) are part of the relationship between the insurer and the insured in the sense that the search and examination determines what is excluded from the policy and the collective rate-making determines how much the insured pays for the coverage received. ID at 88, n.286. Although our application of the *Royal Drug* criteria to the facts differs from the ALJ's, our conclusion is the same – the antitrust exemption is inapplicable.

The Supreme Court's analyses in *Royal Drug* and *Pireno* each begin with the admonition that antitrust exemptions are to be narrowly construed. As noted pre-

viously, the exemption here is limited to the business of insurance, not the business of insurers. An indispensable characteristic of the business of insurance is the spreading and underwriting of a policyholder's risk. *Royal Drug*, 440 U.S. at 211-212; *Pireno*, 458 U.S. at 127.

The parties expended considerable energy arguing about the relative importance of the three criteria set forth in *Royal Drug*. Our analysis proceeds from the Supreme Court's statement in *Pireno* that "[n]one of these criteria is necessarily determinative in itself, . . . 458 U.S. at 129." Support for the contention that none of the criteria is determinative is found in the fact that the court examined all three criteria in both *Pireno* and *Royal Drug*. An alternative contention stresses the "necessarily" in the Court's language in *Pireno*, suggesting that in a particular case one criterion might be determinative. Under this view, the Court's review of all three factors in both cases may have been undertaken for the purpose of illustrating how the criteria should be interpreted. We find both contentions plausible.

Given this conundrum, we could choose a method of analysis that utilizes a balancing test while examining all three criteria. Such a balancing approach could flow from the statement in *Pireno* that "[w]e may assume the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis." 458 U.S. at 133 (emphasis in original). This is consistent with the Court's language in the same opinion that "[n]one of these criteria is necessarily determinative in itself." 458 U.S. at 129. (Note, again, the use of the word "necessarily" in this last statement – it may mean that in an individual case a single criterion could be determinative.) We need not

engage in any balancing of the *Royal Drug* criteria here, though, since our examination reveals that the activity in question fails to meet all three criteria.

A second, parallel method of analysis would be to treat underwriting and risk spreading as the essence of all three criteria. This is suggested by the Court's statement that underwriting and risk spreading is an "indispensable" element of insurance. Further, when the *Pireno* court examined the second criterion, it focused on the fact that the peer review under scrutiny occurred only after the risk had been transferred—"the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by ULL's insurance policies." 458 U.S. at 130. The Court also noted that the third criterion arose out of the need to protect "intra-industry cooperation" in the underwriting of risks—"[a]rrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern." 458 U.S. at 133. Under this second method of analysis, we conclude that Respondents' search and examination services are not the business of insurance. We now elaborate upon the basis for this conclusion.

As to the first *Royal Drug* criterion, we hold that the practice under scrutiny here does not underwrite or spread risk. Separate risk rates are not at issue. The complaint challenged collectively set rates that have as their foundation the non-insurance service of informing buyers and lenders of the existence of title defects on properties. FF. 102-103. The costs of performing these services (including the fixed costs of the title plants)—and not claims from losses incurred by insuring against risks—largely drive the rates charged. F. 99. Thus, we are not convinced by Respondents' argument that the search and examination defines the risk that is transferred. Rather, Respondents'

search and examination activities, in addition to informing buyers and lenders about the status of the title, also serve to reduce Respondents' expenses by excluding risk (e.g., liens, etc.) from coverage.

Search and examination services, like the Pharmacy Agreements in *Royal Drug*, are indistinguishable "from countless other business arrangements that may be made by insurance companies to keep their costs low." *Royal Drug*, 440 U.S. at 215. As the Supreme Court noted in *Royal Drug*, "there is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk." *Royal Drug*, 440 U.S. at 214-15 n.12.

The record shows that this is an industry in which there is little, if any, real discretion during the search and examination process, precisely because the title insurers want to eliminate risk coverage from the contract with the insured. FF. 72, 75-83, ID at 85. Risks in fact are excluded routinely from coverage (with the limited exceptions noted in the record for which an additional "risk" fee is charged). Indeed, the rates charged to the insured are not based on the risk associated with that particular property but rather on the purchase price of the property. F. 100.

Our finding is consistent with the decision by the Ninth Circuit in *TIRBA* which held that the provision of escrow services by title insurance companies does not fall within the business of insurance exemption.[11] The escrow services

[11] The *TIRBA* court noted also that the pre-*Royal Drug* cases cited by TIRBA were not helpful to TIRBA's position. *See* 700 F.2d at 1251, n.1. We agree. Prior to *Royal Drug*, there existed "an expansive interpretation of the 'business of insurance' requirement . . .". *Id.* We thus decline to rely upon those same pre-*Royal Drug* cases now cited by Respondents.

at issue are similar to those under scrutiny here in that "the escrow agent reviews documents demonstrating the removal of encumbrances which would otherwise have to be excluded from insurance coverage." 700 F.2d at 1251. As noted above, the purpose of search and examination is to find defects which then are excepted from coverage. The *TIRBA* court accepted the government's argument that the escrow agent performed "merely ministerial functions" and determined that the escrow process itself "does not spread or underwrite risk." *Id.* The court rejected the argument that "mechanisms that merely reduce costs to the insurers are part of the business of insurance." *Id.*

The second criterion involves the policy relationship between the insurer and the insured and focuses on "the type of policy which could be issued, its reliability, interpretation, and enforcement." *Pireno*, 458 U.S. at 128. We are convinced that the risk spreadings or underwriting concept applies to this criterion. CCAB at 27.[23]

The title examiner's search and examination does not involve the spreading or underwriting or risks. Instead, a search and examination only provides information to the insured and the lender as to the status of title. The insurance company separately determines what must be excluded from the policy that is later issued. FF. 59 and 74. The general rule of title insurers is that all identified liens and encumbrances must be listed on the policy as exceptions to coverage. The title examiner does not decide to provide coverage; the title insurer has already decided, as a matter of company policy, not to assume the risk of loss from existing liens and encumbrances. CCAB at 29.

[23] In accord is *TIRBA*, 700 F.2d at 1252, where, in analyzing the second criterion, the Ninth Circuit rejected TIRBA's argument that the escrow process is essential in determining what risks will be accepted by the title insurer.

We agree with Complaint Counsel that correctly applied to title insurance, the "insurer-insured" relationship only extends to the decision of whether a particular defect should be given coverage, such as whether or not to provide coverage for mechanics liens. CCAB at 29. "The legal examination of title that merely reports, in a given case, whether a mechanics' lien has been filed, is a legal determination that is unrelated to insurance company decisions regarding the coverage of policies." CCAB at 29-30. We thus hold that the search and examination, as properly interpreted, is not a part of the "insurer-insured" relationship.

The third criterion concerns whether the practice is limited to entities within the industry. In *Pireno,* the Court stated that the involvement of outside parties need not result in a denial of the exemption, "[b]ut the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis." 458 U.S. at 133. Referring to *Royal Drug*, the *Pireno* court then noted that "§ 2(b) [of McCarran-Ferguson] was intended primarily to protect 'intra-industry cooperation' in the underwriting of risks." *Id.* "Arrangements between insurance companies and parties outside the industry can hardly be said to lie at the center of that legislative concern." *Id.* "More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets." *Id.*

In its examination of the third criterion, the *TIRBA* court granted that the fixing of escrow service prices took place among members of the industry. "Thus, TIRBA's activity would seem at first glance to satisfy the third requirement." *TIRBA,* 700 F.2d at 1252. The "complication," as the *TIRBA* court termed it, was that entities

other than insurance companies perform escrow services, "so that immunizing price-setting by insurance companies who perform escrow services would distort competition by those who are not insurance companies." *Id.* As a consequence, the *TIRBA* court ruled that the escrow service price fixing did not satisfy the third criterion. This result seems compatible with the concern expressed in *Pireno* about avoiding the restraint of competition in noninsurance markets.

Our reasoning is in according with that of the Ninth Circuit in *TIRBA*. Both the escrow services at issue in *TIRBA* and the search and examination services at issue here are ministerial and noninsurance in nature. *TIRBA*, 700 F.2d at 1251. Further, both escrow and search and examination services are commonly provided apart from any "insurance" trappings. The escrow services in *TIRBA* could be bought apart from buying title insurance. *Id.* at 1252. In the instant case, attorneys' opinions can be a substitute for title insurance. Thus, immunizing price-setting by insurance companies who perform search and examination services may distort competition in non-insurance markets, *e.g.*, in states where the use of an attorney's opinion is still commonplace. F. 35.

There is an additional reason why Respondents' activities do not meet the third criterion. As we read *Pireno's* discussion of the third criterion, the Supreme Court was concerned with protecting the legitimate "intra-industry cooperation" needs of the insurance industry for the purpose of underwriting risks. 458 U.S. at 133. Yet, the industry itself believes that it is not possible to set up an actuarial standard for risk assumption based on loss experience. F. 114. As the ALJ found, there "is no evidence that title insurance rates are set collectively through rating bureaus as a way of obtaining intra-industry cooperation

in the pooling of risk information." F. 114. *See* FF. 112-115 generally. It is noteworthy that the search and examination services are provided by both insurance companies and persons that do not participate in the insurance business (such as independent attorneys providing opinions), indicating the lack of need for intra-industry cooperation. While the price-fixing encountered here encompasses charges for tasks performed by the employees and agents of the title insurers, we conclude that those employees and agents are not performing an insurance function at the time.

Respondents assert, however, that one Court of Appeals has expressly rejected the view that only ratemaking arrangements limited to the risk or loss portion of insurer's expenses are exempt, citing the pre-*Pireno* case of *Proctor v. State Farm,* 675 F.2d 308, 323 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 839 (1982):

> Risk probability is only one element of the ratemaking formula, however. Insurers must also factor in the magnitude of the loss . . . i.e., the cost of repairing (or replacing) the damaged vehicle. . . . In this case, insurers have allegedly collected and shared data on the cost of repair . . . such activity is closely akin to cooperative ratemaking since it involves a necessary part of the ratemaking process.

The reasoning of this case does not help Respondents.[24] Clearly, a single insurer's ability to predict costs of repair on a car may be improved by examining industry average data, *e.g.*, by surveying 1000 cases to determine what

[24] There is serious question whether *Proctor* has continuing vitality in light of *Pireno.* The *Proctor* court expressly disagreed with the Second Circuit's decision in *Pireno,* 650 F.2d 387, 394-95 (2d Cir. 1981). The Supreme Court, however, affirmed the Second Circuit's decision. *Pireno,* 458 U.S. at 134.

garages charge to repair a fender on a particular car. Obviously, it would be easier to do this by sharing data among insurance companies. This type of actuarial assessment, however, does not take place in the title insurance industry for search and examination rates. Respondents state that the title history of each transaction is unique and consequently "an insurer cannot reliably assess on an actuarial or statistical basis whether the purchaser will be vested with fee simple title or whether any defects or encumbrances exist with respect to the particular property to be insured." RAB at 48. *See also* F. 114. Instead, search and examination rates are set essentially by looking at the costs of bureaucratic operations rather than claims experience. Such costs are individually ascertainable by each insurer. ID at 86-87.[25]

We conclude, then, that the activities under scrutiny are not protected by the "business of insurance" exemption. The activities fail to meet all three of the *Royal Drug* criteria. In addition, "search and examination" services,

[25] Respondents also rely upon *In re Equifax Inc.*, 96 F.T.C. 844 (1980). Complaint Counsel counters that in *Equifax*, "the Commission found exempt the collection of medical information from doctors by a consumer reporting agency for use by insurance companies in deciding whether to accept insurance applications and pay claims. [footnote omitted] In *Pireno*, the district court found exempt the collection of medical information by insurance companies from a peer review committee of chiropractors for the purpose of deciding what would constitute reasonable claim payments. [footnote omitted] The Second Circuit and the Supreme Court, however, held that the activity [in *Pireno*] was not part of the 'business of insurance.' [footnote omitted] The information gathering function in *Equifax* did not even provide as strong an argument for an exemption as was the case in *Pireno* because in *Equifax* the information gathering was done by an independent company, not by the insurer." CCAB 37. We agree with the assessment of Complaint Counsel that *Equifax* is no longer good law in light of *Pireno*. CCAB at 36-40.

performed by non-insurers and insurance companies alike, do not have the indispensable element of risk spreading or underwriting necessary to qualify as the business of insurance.

V. *THE NOERR-PENNINGTON DEFENSE*

Respondents argue that the activities in question are protected from antitrust challenge under the *Noerr-Pennington* doctrine.[26] That doctrine, generally speaking, establishes that concerted private efforts to persuade governmental authorities to take action to restrain competition are not subject to the Sherman Act, absent circumstances where such concerted petitioning constitutes a "sham," or an abuse of process.

The ALJ held that arguing that forbidding the collective fixing of rates by competitors somehow interferes with their right of political advocacy is analogous to saying that contractors should be allowed to conspire to rig bids on government projects, "so long as the results of the conspiracy are wrapped in the trappings of a 'petition' or proposal which may be said to convey policy information to official decisionmakers." ID at 99. The ALJ thus denied use of the defense.

Respondents argue, *inter alia*, that the ALJ's ruling conflicts with *Horsemen's Benevolent and Protective Association, Inc. v. Pennsylvania Horse Racing Commission*, 530 F. Supp. 1098 (E.D. Pa.) *aff'd mem.*, 688 F.2d 821 (3d Cir. 1982). "In that case, a jockeys' guild allegedly conspired to restrain trade by petitioning the state racing commission to increase jockey fees. The jockeys allegedly

[26] This doctrine is based upon: *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking, Unlimited*, 404 U.S. 508 (1971).

agreed among themselves on a proposed schedule of fees, then urged the commission to adopt the schedule." RAB at 74. In *Horsemen's,* the court held that the jockeys' guild's successful attempt to influence a state commission to increase the jockeys' pay was protected by *Noerr* and thus did not violate the antitrust laws, 530 F. Supp. at 1109.

Respondents further argue that they were required to file rates with the state and could not legally charge rates that the state disapproved. Respondents, moreover, disagree with the ALJ's bid rigging analogy. Bid rigging is not "joint petitioning," but "a furtive, fraudulent effort to deprive the state's purchasing agents of the benefits of competition. Bidriggers make no effort to provide relevant information to state policymakers." RAB at 76. "By contrast, respondents sought to influence state policy . . ." RAB at 77. "Unlike bidriggers, respondents engaged in this activity openly and above-board. They responded, in fact, to explicit invitations by the state to petition collectively." RAB at 77.

Respondents also state that the ALJ's reliance on *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982), *rev'd,* 471 U.S. 48 (1985), is misplaced. Respondents assert that although the Supreme Court granted *certiorari* in *Southern Motor Carriers* on the *Noerr* issue the Court did not rule on it. The Court of Appeals decision in that case is said to be "illogical." RAB at 78.

Complaint Counsel argues that Respondents' *Noerr* standard would mean in effect that a group of competitors could collectively file and use rates without any active state supervision and yet still be exempt from the antitrust laws. Labeling that argument as "clearly wrong," Complaint Counsel asserts that *Noerr* merely protects collective petitioning to induce lawful government action. It does not

protect agreements to use collectively determined rates that may or may not be adopted by the government. CCAB at 138.[27]

We find the *Noerr* defense inapplicable here. First, we are not being asked to consider the legitimacy of collective attempts to lobby the state to require concerted ratemaking.[28] Rather, Respondents merely agreed on what rates should be submitted to the state for consideration, after which they implemented the collectively-set rates. If Respondents had instead agreed on a political advocacy campaign to convince the state to adopt or change a ratemaking policy, such activity would be protected.[29] The

---

[27] Complaint Counsel proposes the following *Noerr* standard. CCAB at 140. *Noerr* should complement the state action doctrine. *Noerr* deals solely with collective proposals to influence and obtain anticompetitive government action. The state action doctrine explains that the state must clearly articulate and actively supervise before the parties to the proposal can implement their proposals. Thus, if a state permits a collective proposal to become effective without active supervision then implementation of the proposal is unlawful. The proposal (and the agreement on price that preceded the proposal) is protected by *Noerr* but the implementation constitutes anticompetitive private action for which the private actors may be held liable. In the instant case, more than petitioning took place. Respondents also proceeded to charge the collectively-set rates. CCAB at 144.

[28] Respondents also cite in passing *Llewellyn v. Crothers,* 765 F.2d 769 (9th Cir. 1985). The court, with sparse language, ruled there was a valid *Noerr* defense where "lobbying efforts" by a public corporation defendant (SAIF) "resulted in lawful action" by the state workers' compensation department. *Id.* at 775. However, the instant case does not involve lobbying—it involves collective rate setting.

[29] Such a distinction is important because in *Noerr,* the Supreme Court distinguished collective lobbying activities from the kinds of combinations "ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom . . . through the use of such devices as price-fixing agreements . . . and other similar arrangements." 365 U.S. at 136.

agreements in this case, however, were not coincident to the formulation of positions on the desirability of collective rates.[30] We thus think Respondents mischaracterized the evidence when they stated that they "sought to influence state policy. . . ." RAB at 77.

The Supreme Court's recent pronouncement on *Noerr* in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988), is directly relevant here. The Court stated that "*Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." 108 S. Ct. at 1939. The context and nature of the defendant's activity in *Allied* made it "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Id.*[31] Consequently, *Noerr* protection was not available in that case.

Using the *Allied* analysis, we must evaluate the "context and nature" of Respondents' activity to determine whether it is the type that has "traditionally had its validity determined by the antitrust laws themselves." Respondents'

[30] *Cf. Litton Systems, Inc. v. AT&T Co.*, 1982-83 CCH Trade Cas. ¶ 65,194 (2d Cir. 1983), at 71,777:

> AT&T erroneously assumes that a mere incident of regulation—the tariff filing requirement—is tantamount to a request for governmental action akin to the conduct held protected in Noerr and Pennington . . . The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC. . . ".

[31] As we stated in *New England*, slip op. at 23, "[b]ecause of its context (private standard-setting) and nature (packing the annual meeting) the Court concluded that Allied's activity, in essence promoting agreements not to manufacture, distribute, or purchase pla[i]ntiff's product, *id.* at 1937, was 'the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves,' *id.* at 1939."

collective rate formulation and adoption were equivalent to a horizontal price agreement among competitors. Such an arrangement traditionally has had its validity determined by the antitrust laws. Immunizing Respondents' conduct would lead to the result the Supreme Court in *Indian Head* said should be avoided:

> Just as the antitrust laws should not regulate political activities simply because those activities have a commercial impact [citation omitted] so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact. [footnote omitted]

Indeed, the Court in *Allied* employed an example that is telling:

> We cannot agree with [Allied's] absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports.

108 S. Ct. at 1938-39.

Thus, Respondents' collective rate setting efforts can "more aptly be characterized as commercial activity with a political impact," 108 S. Ct. at 1941, than as political activity with a commercial impact. Consequently, we hold that the *Noerr* doctrine does not immunize Respondents' collective ratemaking from the antitrust laws.

Horsemen's, a case on which Respondents rely, was decided before *Allied.* It did not include in its reasoning the *Allied* formulation that the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have some political impact.

The factual premise in *Horsemen's,* furthermore, differs from that herein. *Horsemen's* was based on an "information" rationale:

> The *Noerr-Pennington* doctrine is applicable here. The members of the [jockey] Guild, in the exercise of their First Amendment rights of association and to petition the government, may jointly submit a proposal to increase jockey fees to the Horse Racing Commission. Since the law permits them to do this, it follows that they must be permitted to confer and to agree upon the fees they wish to propose. [citation omitted] It is vital to the effective functioning of the Commission that it be informed by the jockeys and other interested parties concerning the effectiveness or inadequacy of the current jockey fee schedule. * * * In order to accomplish this objective, it is clearly permissible for the Commission to consider data and suggestions submitted by the jockeys themselves who unquestionably are the most fertile source of information concerning the adequacy of their compensation. [footnote omitted]

In other words, the *Horsemen's* court placed reliance on the necessity for private collective action in order to enable the governmental authorities to receive vital information and accomplish the underlying objective of the state regulatory scheme.

As such, *Horsemen's* does not help Respondents' argument. The *Horsemen's* court relied on the needed participation in the decisionmaking process of the regulated parties, who provided data that helped the state carry out its regulatory program. But as noted herein, there is no such "need" for participation by the regulated parties here. The collective setting of search and examination rates has no logical connection with underwriting and risk spread-

ing; there is no evidence that collective ratemaking is undertaken by title insurers for the purpose of sharing their collective risk experience.

> To the contrary, the record evidence is overwhelming that both joint and individual rates for title insurance (i.e., apart from the "risk" rate) are set by looking to the cost of performing the search and examination service rather than the claims experience of insurers. This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurers, and *therefore the basic rationale of the McCarran Act—that is, the presumed need for insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present.* (Emphasis supplied)

ID at 86.

We thus conclude that *Horsemen's,* even if it is good law after *Allied,* is inapposite. If anything, Respondents' provision of information can be characterized essentially as a "sham," analogous to the unprotected "sham" petitioning behavior in *California Motor Transport* v. *Trucking Unlimited,* 404 U.S. 508, 513-16 (1972).[32]

VI. *RULE OF REASON*

The ALJ held that the collective ratemaking activities of a rating bureau are not governed by the rule of reason because such agreements are per se illegal. ID at 100. Re-

---

[32] We note in passing that nothing in our decision would prohibit parties collectively from providing meaningful information to state authorities, such as proposing statistical methodologies by which a state commission could determine whether individual submissions and rate requests by members of the industry were "reasonable."

spondents argue, *inter alia,* however, that the Supreme Court's pronouncements in *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979), and *NCAA* v. *Board of Regents of the University of Oklahoma,* 468 U.S. 85 (1984), stand for the proposition that price-fixing should not be treated automatically as a per se violation of the antitrust laws. Respondents also contend that the rate filings in this case cannot be considered per se unlawful because they were filed through state-sanctioned rating bureaus and because such rates must meet certain statutory standards (*e.g.,* reasonableness).

We disagree with Respondents' argument. Using the reasoning we employed in *Massachusetts Board of Registration in Optometry,* 110 F.T.C. 549 (1988), we find the challenged agreements are inherently suspect. *Id.* at 604. Respondents have not advanced, and we cannot conceive of, any plausible efficiency justification for their price-fixing activities. Nor can they argue that title insurance would be unavailable but for their price-fixing – the record is clear that in the majority of states such practices are not permitted and title "insurance" still is provided. Accordingly, we hold that Respondents' price fixing violates Section 5 of the FTC Act.

VII. *REMEDY*

The ALJ would issue an order limited to the states where there was a law violation and prohibit Respondents perpetually from discussing, proposing, setting or filing any rates for title search and examination services through a rating bureau. We concur with this assessment of the appropriate scope of the order although we have expanded the number of states included in the order.

To the extent an order is appropriate, Respondents argue that the ALJ's order is overly broad in that it would

not permit rate bureau participation even where protected by the state action doctrine.[33] We agree with this point and the attached order incorporates an appropriate reflection of the state action doctrine.

Respondents also contend that the order should not be perpetual, stating that their participation in the rating bureaus was conducted openly and in good faith observance of existing legal standards. RAB at 85-86, RRB at 111. "The current volatility of the law of state action immunity, as well as the possibility of future changes in state regulatory practices, warrants that any decree that purports to spell out a standard of 'active supervision' be of limited duration." RRB at 111-112.

Our proposed order enjoins the respondents from fixing prices for title search and examination services in perpetuity. It is the general policy of the Commission, in order to foster deterrence, that conduct prohibitions be perpetual. Respondents' claim that courts and the Commission have found it necessary to limit the duration of orders "in similar circumstances" (see RAB at 86) is unfounded. For example, respondents cite for this point *In the Matter of Kraftco Corporation,* 89 F.T.C. 46, *rev'd on other grounds,* 565 F.2d 807 (1977). In this case, Kraftco was found to have violated both the Clayton Act and the FTC Act by use of an interlocking directorate. *Kraftco,* 89

---

[33] Complaint Counsel agrees that any order should contain a state action proviso. However, Complaint Counsel's proposed proviso would limit the defense to those states that provided for active supervision through notice, comment and written decision procedures. CCAB at 157. We reject such an approach as being too rigid an application of the active supervision requirement.

Respondents also opposed Complaint Counsel's suggestions that the order should encompass all forms of price fixing and not be limited in geographic coverage. We need not discuss those arguments in view of the relief ordered.

F.T.C. at 60. While the Commission did limit the duration of the provision of the order specifying a particular means of compliance with the order, the Commission in no way limited the duration of the order's core prohibition against such practice. *Kraftco,* 89 F.T.C. at 69-70.[34]

Respondents also cite *Occidental Petroleum Corp., et al.,* 101 F.T.C. 373 (1983). However, that case involved removal of a perpetual conduct provision under the order modification process after consideration of a petition and opportunity for public comment and after passage of time under the order had demonstrated there was no need for the perpetual provision. The Commission expressly reiterated that perpetual conduct orders remain appropriate. *Occidental,* 101 F.T.C. at 374.

Respondents' assertion that the order should not be of perpetual duration because it responds to actions taken openly and in good faith is unpersuasive. The order against Respondents is narrowly crafted and will not impede their lawful business activities. Further, the perpetual aspect merely forbids conduct – horizontal price-fixing – which is per se unlawful. Respondents' "good faith" assertions remain unproven among contradicting hypotheses. But, in any event, once stripped of the inadequate state action and business of insurance justifications, these activities have been shown to constitute pernicious antitrust violations.

---

[34] Similarly inapposite is Respondents' citation of *Lenox, Inc. v. Federal Trade Commission,* 417 F.2d 126 (2d Cir. 1969). The three-year term limitations there were imposed upon fencing-in provisions, not core conduct provisions. *See In the Matter of Lenox, Incorporated,* 77 F.T.C. 860, 861 (1970).

SEPARATE STATEMENT OF COMMISSIONER CALVANI

I concur in the Commission's decision, with one exception. I would affirm the Administrative Law Judge's findings that New Jersey and Pennsylvania have clearly articulated a policy to displace competition.

In each state, the statutory language suggests that its authorization of collective rate-making for insurance might not extend to services provided by insurance company attorney-agents. Each statute, after describing the scope of regulated fees, provides that those do not include charges paid to an attorney. For each state, the Administrative Law Judge resolved what he perceived as statutory ambiguity by examining the state's practice and intent. Pennsylvania filed an amicus brief explaining that it interprets its own law to make regulated inclusive insurance rates (that is, those that include search and examination) applicable to attorney-agents, and that the legislature merely intended by the proviso to exclude from this regulatory scheme those aspects of an attorney-agent's law practice that are unrelated to title insurance, such as issuing opinions. New Jersey did not submit a brief, but its evidence showed that its practice is similar to Pennsylvania's.

In *Southern Motor Carriers,* the Court said that special deference should be given to a state administrative agency's interpretation of its own regulatory statute. 471 U.S. at 64. The two states' agencies interpret their statutes as requiring filing of fees by all agents who issue commitments and policies, including those who are lawyers. There is no case law authority in either state contradicting the agencies' interpretation of their powers, nor indeed has anyone in either state previously contested them. The statutes are comprehensive regulatory schemes, placing the conduct and fees of all title insurance agents within the

agencies' regulatory jurisdiction regardless of attorney status. The provisos are best read as the Administrative Law Judge read them, rhetorical concessions to the bar to alleviate concerns that the agencies not regulate legal fees unrelated to title insurance transactions.

The Commission should not lightly substitute its own interpretation of state laws in contradiction to the states' own interpretation, with no support but its own reading of the texts. I am sensitive to the danger of allowing agency bootstrapping into *ultra vires* territory, *see FMC v. Seatrain Lines,* 411 U.S. 726, 745 (1973). But the Commission may not always be the proper agent to prevent that. The issue here is whether the respondents have violated the law because the states had not articulated their policy against competition clearly enough. Here, the state agencies have formally appeared on the record to assert that their law does indeed articulate such a policy. The laws are not as ambiguous as the Administrative Law Judge believed, but the states' practice leaves no room for doubt about what they think they mean.

SEPARATE STATEMENT OF COMMISSIONER AZCUENAGA, CONCURRING IN PART AND DISSENTING IN PART, IN *TICOR TITLE INSURANCE CO.*, DOCKET NO. 9190

I agree with the majority that the collective ratemaking for title search and examination services engaged in by the respondents in Arizona, Connecticut, Idaho, Montana, New Jersey, Pennsylvania, and Wisconsin was unlawful price fixing. I agree that title search and examination services are not the "business of insurance," and that the respondents' collective ratemaking activities are not protected under the *Noerr-Pennington* doctrine. I also agree that the respondents' collective ratemaking in Montana, New Jersey, Pennsylvania, and Wisconsin are not protected by the state action doctrine. I disagree, however, with the conclusion of the majority that the respondents' collective ratemaking was not actively supervised in Arizona and Connecticut, and I also disagree with the conclusion of Commissioners Strenio and Calvani that the respondents were not actively supervised in Idaho.

Active supervision is not established merely by the existence of statutory authority to review anticompetitive acts of private parties and disapprove those that fail to accord with state policy. We must also consider whether state officials exercise that authority. *Patrick v. Burget,* 108 S. Ct. 1658, 1663 (1988). We know from *Patrick* that active supervision requires a review sufficient to ascertain consistency with state policy. I therefore agree with the majority's holding that the active supervision requirement is satisfied only where a state official or agency has engaged in a "substantive review" of the collective rate proposals. Slip op. at 9.[1]

---

[1] The following abbreviations are used in this statement:

Slip op. — slip opinion of the majority
I.D. — initial decision

The majority's statement that the active supervision requirement is satisfied "only where the state agency has acted affirmatively to review and approve the proposed tariff or rate," *id.*, along with its quotation of the majority's statement in *New England Motor Rate Bureau*, Docket No. 9170 (Aug. 18, 1989), that "[n]o clear inference of conscious state approval . . . can be drawn from a state agency's passive acceptance . . . of rate filings," *id.* (quoting *New England*, slip op. at 15), suggests that the majority would find active supervision only when the agency engages in some visible activity. By suggesting that evidence of affirmative activity is required, the majority apparently excludes as a basis for active supervision the use of so-called "negative option" procedures, pursuant to which a proposed rate is deemed approved if it is not rejected or suspended by the state agency before a certain number of days have passed.[2] As I explained in my separate statement concurring in part and dissenting in part in *New England*, slip op. at 3-5 (Azcuenaga, concurring in part and dissenting in part), this approach may be too facile and may overlook a genuine review on the merits.

The majority's statement that an affirmative, substantive review "ensures that the state agency has consciously considered the anticompetitive consequences of the ac-

---

I.D.F.	– initial decision finding
Tr.	– transcript of testimony
CX	– complaint counsel's exhibit
RX	– respondents' exhibit
JXA	– joint physical exhibit A.

[2] Negative option procedures (also known as "file and use," "use and file," or "deemer" procedures) were used in Connecticut, Wisconsin, Arizona, and Montana. In Idaho, by contrast, rate filings were not effective until they were approved by the department of insurance. *See, e.g.*, I.D.F. 165.

tivity," slip op. at 14, reveals a fundamental misunderstanding of the gravamen of the state action doctrine. The agency need not consider the anticompetitive consequences of the private acts it is reviewing; it need only examine the consonance of those acts with the state's regulatory policy. Although we may earnestly believe that it is a mistake for a state to choose to displace competition among title insurance firms with a regulatory system that permits those firms to set prices collectively, it is not our place to use the federal antitrust laws to displace that state's decision. The majority's apparent distaste for state-regulated price-fixing, which I share, perhaps carries more weight than it should in the majority's analysis of active supervision.

The decision of the majority with respect to active supervision is particularly difficult, if not impossible, to reconcile with the recent decision of the Commission regarding active supervision in *New England Motor Rate Bureau*, Docket No. 9170 (Aug. 18, 1989). In *New England*, the majority found active supervision in the state of Rhode Island apparently based solely on one post-complaint hearing and the fact that the Rhode Island agency could point to written orders indicating that rates had been approved. *New England*, slip op. at 6-7, 21-22. To the extent that the majority prefers visible activity of review over the testimony of state officials that review in fact occurred, there is far more evidence of such activity in Connecticut, Arizona and Idaho than there was in the *New England* case in Rhode Island.

Connecticut

The Connecticut rating bureau filed only two general rate proposals, one in 1966 and one in 1981. I.D.F. 130. The majority concludes that Connecticut did not actively

supervise the rating bureau because it did not "meaningfully examine" either of those filings. Slip op. at 12. The majority also concludes that Connecticut did not give sufficient review to a number of ancillary findings. *Id.*

As the ALJ noted, "[w]ith the passage of time, the facts relating to the 1966 filing are elusive." I.D.F. 130. The record does show that the Connecticut insurance department wrote to the rating bureau on April 3, 1966, to request additional information and to schedule a meeting between the insurance commissioner and the president of the rating bureau, RX 104; that the rating bureau wrote its members seeking additional statistical data, RX 105; that the rating bureau told the insurance department that it was "preparing the data requested by you" and expected to submit that data soon after May 24, 1966, RX 105A; that the rating bureau withdrew its original filing in favor of a revised filing, RX 106-07; and that the department approved the revised rate filing several weeks later, RX 110.

The majority agrees with the ALJ's finding that "there is no evidence that the department's request for justification relating to this rate was ever answered satisfactorily." Slip op. at 12, *quoting* I.D.F. 130.[3] Of course, the record con-

---

[3] At first glance, the situation in Montana may appear similar. But I agree with the majority that there is no evidence of active supervision in Montana, although my reasons are somewhat different. The record contains virtually no information about the Montana insurance department's supervision of the 1983 filing, which was the only general rate filing submitted by the Montana rating bureau in the two and one-half years of its existence. The parties stipulated that the department official who was responsible for reviewing the 1983 filing met with the former director of the rating bureau, Robert L. Stratton, the day he submitted that filing, but that she has no recollection of what was said at that meeting or whether the rating bureau provided any additional financial or statistical data to the department at a later time. CX 343A-D.

According to the majority, Montana requested additional data about that filing, but "[t]here is no evidence that the additional data

tains no evidence that the department's request was *not* answered satisfactorily. Even assuming that the department's request was in fact not answered, this would tell us very little, if anything, about whether the department performed a substantive review of the rate filing.

The letter of April 3, 1966, and the subsequent exchange of correspondence demonstrates at least that personnel in the insurance department were aware of the 1966 filing and that they took some steps that indicate attention on their part relevant to a review of that filing on the merits. The more plausible reading of the evidence is that the de-

---

requested by the state was ever provided." Slip op. at 23 (*citing* I.D.F. 177). It is not clear that Montana did seek any additional data about the 1983 filing; the state insurance department sent a letter to the rating bureau seeking additional information concerning a supplemental filing submitted in 1984, RX 227, but I am unable to find on the record any such letter concerning the 1983 filing. Although the 1984 letter appears to anticipate a review on the merits, there exists no other evidence suggesting that such a review in fact occurred in Montana at any time. In Connecticut, Arizona, and Idaho, by contrast, there is credible evidence that state officials reviewed some rate filings on the merits; in the absence of evidence to the contrary, it is reasonable to infer that review on the merits also took place at other times.

In his separate additional statement, Commissioner Strenio characterizes my approach as a "some review" active supervision standard, under which "evidence that state officials occasionally exercised their authority" is enough to demonstrate that active supervision has taken place. My colleague apparently misunderstands the basis for my conclusion that Connecticut, Arizona, and Idaho actively supervised respondents' collective rate filings. In those three states, there is general evidence that state officials reviewed rate filings for consistency with state policy, and particular evidence that certain filings were reviewed. In the absence of evidence that no review of other filings was conducted, I believe it is more reasonable to infer that review of those filings did take place. In Wisconsin, by contrast, where there is evidence that no review of certain filings took place, I conclude that the respondents were not actively supervised. *See supra* note 6.

partment's approval of the 1966 collective rate filing was predicated on a review of the filing on the merits.[4] My confidence in this reading is strengthened by the clear evidence of active supervision of the 1981 collective rate filing.

The director of the Connecticut insurance department's Property and Casualty Rating Division, Waldo R. DiSanto, testified that he and another employee of the department, Mr. Walter S. Bell, reviewed the 1981 filing. Tr. at 2744. Mr. DiSanto concluded that the rate filing, which he described as "well-supported and detailed," met the statutory requirements, so it was approved. *Id.* at 2744-45. Mr. Bell testified that he read the filing itself as well as an Arthur D. Little Company report justifying the proposed rates from cover to cover, and that he compared the proposed rates to previous filings. Tr. at 2827-28. The majority nevertheless concludes that the department did not actively supervise the 1981 rate filing because it lacked the statutory authority to control the allegedly excessive commissions paid by respondents to their attorney-agents.[5]

[4] The majority's approach disregards the usual presumption that official actions by public officers have been regularly performed. C. McCormick, *Law of Evidence* § 343, at 807 (2d ed. 1972).

[5] Mr. DiSanto testified that he thought commission expenses were "very high," but that his agency had statutory authority only to verify the validity and accuracy of an insurer's claimed expenses. *Id.* at 2738, 2740. Mr. DiSanto also testified that

> [T]he reason that commission costs are high is that the title insurance companies do not control or make a market.
>
> The market is controlled and made by attorneys. They control the business because people purchasing homes need an attorney and go to him for these functions.
>
> The attorney has the ability in most instances . . . to deal with any title insurance company he wants. . . .

Tr. at 2799. Finally, Mr. DiSanto testified that he had no suspicion that the attorney-agents had agreed to fix the commissions they would charge respondents or had pressured the respondents improperly in order to secure higher commissions. *Id.* at 2804.

According to the majority, Connecticut's failure to "meaningfully regulate a critical component of the ratemaking process" demonstrates that it did not actively supervise the 1981 collective rate.[6] Slip op. at 12.

The Connecticut statute states that insurance rates may not be excessive. *Conn. Gen. Stat.* § 38-201c(a) (JXA at 141). If the insurance commissioner finds that a rate is excessive or otherwise unlawful, he may prohibit the use of the rate. *Id.* at § 38-201p(d). The statute does not provide for the direct review of expenses and does not authorize the commissioner to prohibit excessive expenses. If the commissioner concludes that an insurer's proposed rate is excessive because its expenses are excessive, his remedy is to disapprove the rate, not to regulate the expense. Implicit in Mr. DiSanto's conclusion that the 1981 filing satisfied the requirements of the statute is the conclusion that those proposed rates were not excessive. His testimony

[6] The majority finds a similar problem in Wisconsin. Although I agree that Wisconsin did not actively supervise the respondents, I do not base my conclusion, as the majority does, on Wisconsin's failure to scrutinize the reasonableness of each "critical component" of the respondents' expenses. Norman J. Wirtz, a rate analyst in the Wisconsin insurance commissioner's office, testified that "we did not review" the rates filed by the rating bureau for new policy endorsements because it was assumed that competition among the rating bureau members would drive those rates down. Tr. at 1768-69, 1802-08. Even if Mr. Wirtz's assumption were correct—and he admitted that he did not know whether competition had driven the endorsement rates down—the competitive price would be fortuitous, not a result of active supervision. The state action doctrine allows a state to displace competition with regulation. Wisconsin intended to displace competition by authorizing regulated ratemaking, but the state officials who were given the authority to regulate simply decided not to exercise that authority.

that commission expenses were "very high" is not necessarily inconsistent with such a conclusion.

The Connecticut statute also provides that the insurance department shall consider, among other things, "past and prospective expenses both country-wide and those specially applicable to this state." *Id.* at § 38-201c(b). The Connecticut insurance department certainly considered the issue of commission expenses. Mr. DiSanto testified that his dicussions of the 1981 filing with the members of the rating bureau "center around" commission expenses. Tr. at 2737.

The evidence indicates that the Connecticut insurance department did all that was required of it by the statute. The majority does not question that the Connecticut statute meets the "clear articulation" part of the state action doctrine. It is not justifiable to insist that the insurance department do more than the statute authorizes it to do in order to satisfy the active supervision requirement. The majority may believe that attorney-agents of title insurance companies are paid excessive commissions, but the issue here is active supervision, not whether commissions are too high.

The majority's holding that the 1981 filing was not actively supervised because Connecticut did not "meaningfully regulate a critical component" of the proposed rates has other troubling implications. Commissions to attorney-agents are a significant expense for title insurers, but by no means their only significant expense that the agency might need to consider. The majority's opinion in effect may require a degree of government involvement in the business decisions of regulated firms that begins to look like co-management rather than external supervision in the form of judgments that proposed rates are or are not excessive or otherwise inconsistent with state policy. One other point deserves mention. Assume that the commissions

paid to attorney-agents in Connecticut are excessive—perhaps because those attorney-agents colluded, or due to some market failure. It would be punishing the victims for the Connecticut insurance department to disapprove proposed rates or to take some other action against title insurers.

The Connecticut insurance department has the authority to disapprove excessive rates, but it concluded after its review of the 1981 filing that the proposed rates were not excessive. The Commission has no reason to doubt that active supervision took place.

The majority also holds that what the ALJ characterized as Connecticut's "minimal review" of some of the "ancillary" endorsements and amendments filed between 1966 and 1983 was insufficient. Slip op. at 12. The record shows, however, that Connecticut gave appropriate review to all these filings. As the ALJ noted, some of the ancillary filings were "carefully reviewed." I.D. at 51 n.192. In fact, at least three filings were either disapproved or withdrawn and revised by the rate bureau after state insurance officials questioned certain features of those filings. Tr. at 2759-69. The ALJ's characterization of the review of some other filings as "minimal" seems to be based on Mr. DiSanto's statement that insurance department officials gave greater scrutiny to filings that had greater significance to consumers, and less scrutiny to filings of less importance. *Id.* at 2772. But Mr. DiSanto also testified that the Connecticut insurance department "reviews every filing that we receive." *Id.* at 2758. Mr. DiSanto's unrefuted testimony that all the filings were reviewed, along with the evidence that some filings were formally or informally disapproved, is sufficient to support a finding that all the ancillary filings were reviewed.

Arizona

The majority concludes that Arizona did not actively supervise respondents' collective ratemaking between 1968 and 1981 because the state insurance department "conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years." According to the majority, "[n]o active supervision can be said to exist when a state agency does not even carry out the bare minimum of statutory duties entrusted to it." Slip op. at 17.

Although the majority's reasoning on this point has some appeal, I am not persuaded that an agency's failure to perform each and every one of its statutory duties necessarily demonstrates that it has failed to supervise rates. The Arizona statute that requires examinations of rating bureaus does not specify what is to be examined or why. *Ariz. Rev. Stat. Ann.* § 20-370. Nothing on the face of that statute suggests that the required examination is necessary or even related to the state insurance department's review of rates for conformance with state policy.[7]

I presume that the examination requirement was intended seriously by the legislature, and I do not dismiss as insignificant the department's failure to perform examinations. But the focus of the active supervision part of the state action doctrine is whether the state agency conducted a review sufficient to ascertain that the private acts conform with state policy. Looking to the agency's performance of ancillary functions, however important those functions may be, may actually detract from what should be our primary concern: that is, whether the agency looked at the proposed rates and concluded that they were consistent with state policy.

[7] Of course, nothing on the face of the statute prevents the insurance department from using the required examination as a vehicle for the review of proposed rates. In 1980, the director of the insurance department announced his intention to perform an examination, one purpose of which was to assist the department in the performance of its responsibility to regulate rates. Even if we assume that the examinations that should have been performed before 1980 also would have focused, in part or in whole, on the reasonableness of proposed rates, it is clear that the department had the ability to review those rates through other means. The evidence discussed below, including the testimony of Mr. Barberich, indicates that rates were reviewed even though no examinations were performed until 1980.

The majority also concludes that Arizona did not actively supervise certain "minor rate amendments, adjustments, and endorsements" filed between 1968 and 1981 because "there is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject." Slip op. at 17 (*quoting* I.D. 61, n.233).

Emil L. Barberich, who was the chief deputy director of the Arizona insurance department between 1973 and 1982, testified that every rate filing submitted during those years

> was examined to see if it met the statutory requirements. It was scrutinized and it was either approved or disapproved. There would be sometimes situations where more information was needed and once that was obtained and it met the requirements, it would be approved.

Tr. at 2230. He also testified that the department would have acted promptly if it had believed that any title insurance company was earning excessive profits. *Id.* at 2262.

The majority points to nothing that would call into question the truthfulness or accuracy of this testimony, but concludes nonetheless that the respondents have failed to establish that Arizona actively supervised their col-

lective filings. Mr. Barberich's unchallenged testimony that his department did scrutinize all such filings is credible evidence that it did actively supervise collective rate filings between 1973 and 1982.

The record contains very little information about how the department operated before Mr. Barberich went to work there in 1973, which is unfortunate. It appears that no examination of the rating bureau was performed between 1968 and 1973, but that does not distinguish the earlier period from the tenure of Mr. Barberich. One could infer from this sparse record that the department probably failed to review rate filings.[8] It seems more reasonable, however, to draw inferences from the record evidence about the department's review of rate filings between 1973 and 1982. Government agencies, like all institutions, change as time passes. But it would be surprising if (and we have no reason to think that) the Arizona insurance department's policies, procedures, and personnel changed completely when Mr. Barberich arrived in 1973. Delores Williamson, who succeeded Mr. Barberich, testified that the department's current rate review procedures were similar to those that existed during his tenure. *See, e.g.*, Tr. at 2190-92. In the absence of evidence to the contrary, the more likely inference is that the department followed similar procedures before Mr. Barberich was ap-

[8] The record does contain a letter written by a rating bureau official on October 23, 1969, which says that the department accepted the rating bureau's 1968 general rate filing "without any question and without requirement of any justification thereof." RX-60A. This letter tells us only that the author was not asked to provide justification or otherwise questioned about that filing – it does not purport to describe what did or did not occur inside the state agency. The department's failure to seek additional information, like a failure to hold a hearing on a proposed rate, does not demonstrate that no review occurred.

pointed to his position.[9] Having concluded that the department did actively supervise rate filings submitted after 1973, I conclude that it is more probable than not that the department also reviewed filings submitted before 1973.

In his separate additional statement, Commissioner Strenio also concludes that Arizona could not have actively supervised the respondents' collective rate filings because the personnel in its insurance department were not "qualified" to evaluate the reasonableness of those rates. I do not question my colleague's statement, based on his experience as a member of the Interstate Commerce Commission, that "reviewing rates for reasonableness or possible discrimination is a very difficult task that generally requires highly qualified experts." But I believe the Commission should decline to accept his invitation to base our active supervision determinations in part on a review of the resumes of state regulatory personnel. Federal oversight of the qualifications of state regulatory personnel is hard to distinguish from federal oversight of state regulatory decisionmaking. For example, a decision that actuaries are qualified to be insurance rate reviewers but that accountants (or lawyers or economists or MBA's) are not is essentially a decision that only a particular mode of analysis is acceptable.

Idaho

The Idaho insurance department audited the title insurance rating bureau three times between 1974, when the

[9] The majority's holding in Arizona suggests that it would never find that active supervision occurred in a particular time period unless the state employee who reviewed the rates filed during that period so testified. If that is their intention, perhaps it would be well to state it straight out.

rating bureau was organized, and 1984, when it was dissolved. I.D.F. 164, 171. The department also suspended the rating bureau's first major rate filing until after it held a public hearing and amended a regulation relating to a variety of title insurance matters. I.D.F. 168. The rating bureau's only other general rate filing was approved only after the department subpoenaed additional expense data from the rating bureau members and hired a consultant to examine the filing. I.D.F. 169. Despite this evidence, Commissioners Strenio and Calvani conclude that Idaho did not actively supervise a number of miscellaneous rate adjustments, forms, and endorsements filed by the rating bureau because there was "apparently little or no review" of these filings. Slip op. at 20 (*quoting* I.D. at 68 n.259).

That conclusion seems to be based on nothing more than the inability of Robert A. Fraundorf, the insurance department official who was responsible for the review of those miscellaneous filings, to remember much about the details of those reviews. Given that title insurance filings constituted a relatively small number of the filings that this official was also responsible for reviewing—he also reviewed filings for property and casualty insurance, disability insurance, and several other lines of insurance—and that several years had passed since the filings in question had been submitted, it is not altogether surprising that the official's recall of specifics was less than impressive. On cross-examination, Mr. Fraundorf did testify that he never permitted a title insurance filing to go into effect without reviewing it, and that he "definitely" would have asked questions about each rate filing he reviewed until he was satisfied that the rate was proper. Tr. at 3446-48.

Idaho clearly engaged in active supervision of some of the respondents' collective filings. Mr. Fraundorf's unrefuted testimony that he reviewed all the filings submitted to the department is credible and, along with the other

evidence of review by the Idaho insurance department, is sufficient to support a finding of active supervision of all the filings in question.

Conclusion

The majority's reading of the evidence and application of the state action doctrine loads the dice heavily against the respondents. The majority finds a lack of active supervision even when the record contains direct evidence that substantive review occurred, choosing instead to emphasize various perceived deficiencies. The failure to carry out any statutory requirement, whether that requirement has anything to do with a review of proposed rates for consistency with state policy or not, is taken as proof that active supervision of rates did not take place. On the other hand, the failure to take action to limit commissions paid to attorneys demonstrates a lack of supervision even where such action is not authorized by the agency's enabling statute; the agency must review each and every "critical component" of a proposed rate even if the state legislature intended only that it review the reasonableness of the rate itself. This comes perilously close to a "heads we win, tails you lose" standard.

As in *New England Motor Rate Burea,* the majority appears to approach state action as a doctrine to be narrowly construed as an exemption to the federal policy favoring competition. The state action doctrine involves principles of preemption of state or local law by federal law. *Community Communications Co., Inc. v. City of Boulder,* 455 U.S. 40, 60-70 (1982) (Rehnquist, J., dissenting); *accord, 324 Liquor Corp. v. Duffy,* 479 U.S. 335, 345-46 n.8 (1987); *Fisher v. City of Berkeley,* 475 U.S. 260, 264-65 (1986). It is not our role to question the correctness of a

state agency's decision that proposed rates are reasonable or unreasonable but rather to examine whether a state agency in fact exercises its authority to review privately fixed prices. As an agency concerned with promoting competition, the Commission generally prefers to see prices set by the competitive forces of the market. We have no authority, however, to impose this preference for competition on unwilling states that choose instead to regulate certain industries. To do so would establish the Commission as the arbiter of state policy, a result that the principle of federalism underlying the state action doctrine precludes.

The complaint allegations of violations in Connecticut and Arizona should be dismissed.

ADDITIONAL STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

***TICOR TITLE INSURANCE CO.*, Docket No. 9190**

The majority and Commissioner Azcuenaga ("minority") hold contrasting views on how to apply the active supervision requirement of the state action doctrine. The majority insists upon taking a good look at whether state officials actually have exercised their regulatory authority.[1] The minority, however, as I read the eloquent statement by Commissioner Azcuenaga, would be satisfied by a casual glance. In my judgment, this minority position is shortsighted, apart and aside from the potential harm consumers would be exposed to from price fixing should a quick glimpse approach prevail. As I see it, the position espoused in the minority statement is inconsistent with the principles of a number of state action cases including *Patrick v. Burget*, 108 S. Ct. 1658 (1988), impractical, and inclined to pay far more deference to the presumption of the regular performance of public duties than warranted here.

To begin with, the minority approach apparently would consider the active supervision requirement of substantive review to be fulfilled if there is evidence that state officials occasionally exercised their authority. For example, the minority statement asserts that "[i]n Connecticut, Arizona, and Idaho, there is credible evidence that state officials reviewed some rate filings on the merits; in the

[1] The insistence by the majority is consistent with the unanimous Commission decision to appear on the brief before the Supreme Court alongside the Department of Justice in *Patrick v. Burget*. The brief, filed jointly, emphasized regarding the active supervision issue that "[m]erely finding some state involvement or monitoring does not suffice." [citations omitted] Brief for the United States As Amicus Curiae Supporting Petitioner at 8, *Patrick v. Burget*, No. 86-1145.

absence of evidence to the contrary, it is reasonable to infer that review on the merits also took place at other times." Minority statement at 4, n.3. But this logic flies in the face of *Patrick*, where the Court held not only that there must be a "program of supervision," but also that "[t]he mere presence of some state involvement or monitoring does not suffice." 108 S. Ct. at 1663. Nowhere does the Court suggest that "some review" is adequate to provide active supervision.[2]

Indeed, the discussion in *Patrick* belies any notion that "some review" by supervisory agencies or courts will do. The Court said that "the Oregon courts have indicated that even if they were to provide judicial review of hospital peer-review proceedings, the review would be of a very limited nature." 108 S. Ct. at 1665. "This kind of review would fail to satisfy the state action doctrine's requirement of active supervision." *Id.* "Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine." *Id.* Similarly, haphazard evidence of some review of some rate filings can not by alchemy transform the lead of general inattention into the gold of active supervision.

[2] In accord with *Patrick's* holding that "the mere presence of some state involvement or monitoring does not suffice" is *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345, n.7 (1987). The *Patrick* Court characterized *Duffy* as deciding that "certain forms of state scrutiny . . . did not constitute active supervision because they did not 'exer[t] any significant control over' the terms of the restraint." 108 S. Ct. at 1663. A "some review" standard also would run counter to the Court's admonition in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Contrary to a "some review" line of analysis, these Supreme Court cases stand for the proposition that even a little bit of unsupervised price fixing is impermissible.

The impractical nature of the minority position on active supervision stems from the difficulty of securing firm footing on such a slippery slope. After all, a "some review" standard would beg a series of difficult questions as to just when and where partial review will be tolerated. For instance, would there be active supervision when regulatory officials exercise their authority fifty-one percent of the time? On Tuesdays and Thursdays? When staff is inadequately trained or otherwise incapable of monitoring all types of the private conduct involved?

Another difficult question arises from the minority's dismissal of the evidence that the Arizona Department of Insurance for many years did not carry out a statutorily-required, regular examination of the state rating bureau.[3] The minority expresses skepticism that "an agency's failure to perform each and every one of its statutory duties necessarily demonstrates that it has failed to supervise rates." Minority statement at 8. Yet the minority does not explain which of these failures to comply with statutory duties are to be excused and evidence overcame any presumption of the regular performance of official duties. In contrast, the minority at times seems inclined to go to inordinate lengths in constructing chains of reasoning in support of the presumed existence of official regularity. For example, the minority expresses confidence that active supervision took place in Connecticut in 1966 because of evidence assertedly showing active supervision in 1981. Minority statement at 5. But, such a leap of faith can not surmount the chasm of fifteen years. Too much can change by way of policy and personnel to justify a retroactive finding of active supervision covering the entire period.

[3] Note that as recently as the *Duffy* case, the Supreme Court found active supervision was lacking in a state because it "does not monitor market conditions or engage in any 'pointed reexamination' of the program." 479 U.S. at 345.

Caution also is warranted lest excessive reliance be placed upon the presumption of official regularity. *Patrick* and *Duffy* make clear that the mere creation of a state regulatory mechanism hardly establishes the presence of active supervision. In the realm of state action law, it is advisable to keep in mind the abuses that could flow from credulity toward all claims of active supervision. As the Supreme Court said in *Patrick*, "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." 108 S. Ct. at 1663. That is one reason the Court "sought to ensure that private parties could claim state action immunity from Sherman Act liability only when their anticompetitive acts were truly the product of state regulation" by establishing a "rigorous two-pronged test . . .". 108 S. Ct. at 1662.

Turning now to some of the individual state findings, although a detailed restatement of the majority's assessment is unnecessary, a few comments are worth making in support of the majority's conclusion that active supervision was lacking in Connecticut and Arizona. I do not discuss Idaho below, since an equally-divided Commission found no liability as to that state.

Connecticut

The minority statement makes much of the exchange of correspondence requesting or promising to supply information about the 1966 filing, but brushes aside the fact that no further evidence tending to show the existence of active supervision has been introduced.[5] According to the

[5] The minority statement also asserts that ancillary rate filings were adequately supervised. However, although some ancillary rate filings were disapproved, overall the review process was inadequate. Mr. DiSanto testified that the department never examined insurance company expenses for reasonableness. DiSanto Testimony at 2793. DiSanto testified further that expense information supplied by the title insurers in their annual statements was not even broken out by state. *Id.* at 2795. Without such data, the insurance department lacked the ability to conduct a meaningful review.

minority, the "more plausible reading of the evidence is that the department's approval of the collective rate filing was predicated on a review of the filing on the merits." Minority statement at 4. This observation does not carry the day. In the first place, respondents had the burden of showing active supervision and did not do so here. The Supreme Court in *Patrick* reaffirmed its long-held tenet that respondents have the burden of demonstrating the actual exercise of regulatory authority. *See* Slip Op. at 9-10. *See also City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978).

Further, I think the most plausible reading of the evidence is quite different from the conclusion reached by the minority. It seems to me that a rational agency regularly performing its official duties would retain in its files the most important documentation that exists while discarding the trivia. Here, there is no record whatever of substantiating data—or of any work that was performed upon such hypothetical data. Yet, the relatively unimportant correspondence between the parties has been preserved carefully. To me, this suggests strongly that the agency kept on file everything of the slightest consequence and that substantiating data is missing simply because it never was supplied to the state.

The minority proceeds to infer from the record that the state agency "concluded after its review of the 1981 filing that the proposed rates were not excessive." Minority statement at 7. However, that inference is not readily reconciled with much of the record evidence. The Connecticut statute says that insurance rates may not be

excessive,[6] and also authorizes the state insurance department to prohibit the use of excessive rates by title insurers.[7] Here, though, there is testimony from the Chief of the Connecticut Insurance Department's Property and Casualty Division, Mr. DiSanto, that he approved the rates despite a "disproportionate allowance for commissions." DiSanto Testimony at 2737.[8] Mr. DiSanto testified further that in his view the agent's commission component of title insurer expenses was "very high,"[9] that this was the main problem area in title insurance,[10] and that this was driving up the cost of title insurance.[11] In light of this evidence, it is more reasonable to infer that either the state agency should have disapproved the rates as excessive, or that the Connecticut regulatory system failed to confer to the state agency adequate power in practice to block the imposition of excessive rates. *See* Slip Op. at 12.

Regarding the latter inference, recall the Supreme Court's admonition that "a gauzy cloak of state involvement" can not thwart the national policy in favor of competition. Indeed, a state legislature may clearly articulate and affirmatively express an intent to displace competition (thus meeting the first prong of the state action test), but fall short of the mark set by the second prong if an inadequate system of regulation subsequently is established.

[6] *Conn. Gen. Stat.* § 38-201c(a).

[7] *Id.* at § 38-201p(d).

[8] *See also* DiSanto Testimony at 2756; "Again, one of the things discussed was the impact of commissions and a discussion of alternative means that could effectively address the disproportionate expense loading for commissions."

[9] DiSanto Testimony at 2737. DiSanto estimated that agents' commissions "are about 60 percent" of the title insurance premium. DiSanto Testimony at 2797.

[10] DiSanto Testimony at 2797.

[11] DiSanto Testimony at 2738.

After all, in *Duffy* the Supreme Court found clear articulation but not active supervision since, *inter alia*, the state "d[id] not monitor market conditions or engage in any 'pointed reexamination' of the program."[12] *Duffy*, 479 U.S. at 345. Nor did the state "control month-to-month variations in posted prices."[13] *Id.* In ringing and relevant words, the Court held that active supervision was lacking because the state "has displaced competition among liquor retailers without substituting an adequate system of regulation." *Id.*

Arizona

I have discussed above the extended time during which the state insurance department did not conduct the statutorily-required examination of the state rating bureau, and Director Low's conclusion that such an examination was "of critical importance in permitting the Department to carry out its state regulatory responsibility over title insurers . . .".[14] In addition, Mr. Wilkie's testimony merits consideration in connection with the majority's finding about ancillary filings.

[12] This, of course, was exactly the situation in Arizona during the time no examination of the state rating bureau was conducted despite the statutory mandate.

[13] In other words, the state must exert significant control over all aspects of price fixing by private parties. The majority found, accordingly, that this principle was violated by inactivity such as that displayed by those state insurance agencies that did not examine amendments to the general rate schedules.

The majority opinion notes that the use of scientifically-sound sampling techniques to examine a rate filing might be defensible. Slip Op. at 12. This is because sound sampling techniques may provide an accurate survey of a filing as a whole. The majority opinion goes on to stress the simple point that state agencies may not engage in "hit-or-miss" review by ignoring some filings (or some category of filings) in their entirety. *Id.*

[14] *See* footnote 4, *supra*.

Mr. Wilkie had worked in the Arizona title insurance industry since 1946, and had held a senior position with Lawyers Title of Arizona since about 1957. Wilkie Testimony at 2056. His testimony overall conveys an intimate knowledge of the industry and the operations of the rating bureau. Yet Wilkie, as noted by the ALJ in his Initial Decision at 61, n.233, had no recollection of any communication between the rating bureau and the state agency regarding the numerous amendments that were filed. Given other testimony pointing in a different direction, I agree with the ALJ that the record is inconclusive on this point. However, it bears repeating that respondent has the burden of showing active supervision.

The minority statement does not address other instances of non-supervision cited in the majority opinion. Slip Op. at 18. The minority argues that a likely inference to make about pre-1973 procedures is that they were the same as followed under Mr. Barberich, who was Chief Deputy Director of the Arizona Department of Insurance from 1973 to 1982. Minority statement at 9. However, Mr. Barberich testified that the insurance department hired an outside firm to conduct an examination of the data submitted in 1983 by Tillinghast, Nelson & Warren, Inc. (filed in response to Arizona's tardy efforts to examine the title insurance industry), because "no one in the insurance department had a good handle of what went on with title insurance companies . . .". Barberich Testimony at 2277. Barberich said that during the period 1973 to 1982 he "tried to find someone that could give us a rate review. Going back to 1974 and '75, I remember we paid somebody $1,000 to just give us an idea what it was all about. The report we got didn't tell us anything." Barberich Testimony at 2281. Barberich also testified that the insurance "department did not do anything with respect to that basic rate between 1973 and 1982 . . .". Barberich Testimony at 2289.

This testimony lends further support for two propositions. The first proposition is that the rates in use in Arizona were not actively supervised during the time in question. The insurance department was confronted with complex submissions and yet had no personnel who "had a good handle" on the title insurance industry and the rate justifications that were submitted.[15] As noted previously, the rates were in effect for a number of years before any serious attempt was made to evaluate them.[16] The second proposition is that—where highly complex matters are involved, such as reviewing rates for reasonableness—one must be wary about automatically following presumptions to the effect that substantive reviews are being conducted.[17] Arizona here could not actively supervise the industry for an extended period because it had no qualified personnel.[18] In the context of something as in-

[15] Commissioner Azcuenaga suggests that this conclusion is derived from my "review of the resumes of state regulatory personnel." Minority statement at 10. To the contrary, this conclusion is derived from Mr. Barberich's assessment that "no one in the insurance department had a good handle of what went on with title insurance companies . . .". Barberich Testimony at 2277.

[16] *See also* Slip Op. at 18.

[17] As a former commissioner at the Interstate Commerce Commission, I know from experience that reviewing rates for reasonableness or possible discrimination is a very difficult task that generally requires highly qualified experts. Director Low of the Arizona Department of Insurance apparently would agree. In commenting on the proposed study of the Arizona title insurance industry, his recommendation of a specific firm for the examination was made on the basis of "the extremely technical nature of this examination, including the obvious need for substantial actuarial and economic expertise in this area . . .". RX 93A.

[18] The absence of sufficiently trained personnel seems substantively equivalent to not having an "adequate system of regulation." *Cf. Duffy*, 479 U.S. at 345.

tricate and challenging as the active supervision of rate filings, it thus is necessary for reviewing courts and agencies to sift through the available evidence rather than sit back and presume that all is in order.

Conclusion

The minority concludes that the majority's standard "loads the dice heavily against the respondents" by emphasizing "various perceived deficiencies" in the review process. Minority statement at 11. Yet, as shown here and in the majority opinion, the deficiencies were real and substantial. The case law is clear that state regulatory agencies may not pick and choose when they will exercise their authority; merely providing some state involvement or monitoring can not substitute for active supervision. Further, the non-performance here of statutory duties was directly related to the relevant state policy. *See e.q.*, the discussion of Arizona's non-examination of the title insurance industry. The majority view, accordingly, follows from the Supreme Court's establishment of a "rigorous two-pronged test" (*Patrick v. Burget*, 108 S. Ct. at 1662) requiring that a state "exercise ultimate control over the challenged anticompetitive conduct." *Id.* at 1663.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 9190

IN THE MATTER OF TICOR TITLE INSURANCE COMPANY, A CORPORATION, CHICAGO TITLE INSURANCE COMPANY, A CORPORATION, SAFECO TITLE INSURANCE COMPANY, A CORPORATION, LAWYERS TITLE INSURANCE CORPORATION, A CORPORATION, AND STEWART TITLE GUARANTY COMPANY, A CORPORATION

INITIAL DECISION

By MORTON NEEDELMAN, Administrative Law Judge

I

STATEMENT OF THE CASE

The complaint in this proceeding was issued on January 7, 1985. It charges that in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, respondent insurers,[1] operating through rating bureaus, have restrained competition in setting rates for title search and examination services and settlement services. The gravamen of the complaint appears in Paragraph 11—

---

[1] The complaint cites six title insurers as respondents. On June 24, 1986, the Secretary withdrew this matter from adjudication with respect to First American Title Insurance Company in order for the Commission to consider a settlement agreement under § 3.25(c) of the Commission's rules.

Respondents have agreed on the price to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the Respondents have fixed prices with other Respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.

Respondents' answers, which were filed on February 11 and February 13, 1985, admit that from time to time they have been members of rating bureaus in several states, but challenge the Commission's subject matter jurisdiction on the grounds that rating bureau activity relating to title search and examination and settlement constitute part of the business of insurance and is therefore exempt from the Federal Trade Commission Act by reason of the McCarran-Ferguson Act. Respondents' answers also assert that the alleged anticompetitive practices are immune from the federal antitrust laws by reason of the "state action" doctrine. Additional defenses include mootness based upon withdrawal from the rating bureaus, and the claim that respondents' collective rate making activities come within the *Noerr-Pennington* doctrine.

It became apparent at the outset of this proceeding that the complaint allegation respecting settlement or escrow services was an ancillary issue. At most it only pertains to rating bureau activity in five states—Arizona, Ohio, Connecticut, Pennsylvania, and New Jersey—and since respondents' escrow practices in Arizona are already the subject of injunctive relief as a result of the final order in *United States v. Title Insurance Rating Bureau of Ariz., Inc.*, 517 F. Supp. 1053 (D. Ariz.), *aff'd*, 700 F.2d 1247

(9th Cir.), *cert. denied*, 104 S. Ct. 3509 (1984), both sides directed their efforts almost exclusively to the search and examination issue. The escrow or settlement question, to the extent that it is still an issue in this case, is treated separately for the most part in the Findings of Fact and Discussion herein.

In the prehearing stage, the parties were allowed discovery including advanced notice of proposed exhibits and the prospective testimony of witnesses. Complaint counsel's case-in-chief was heard during the week of February 18, 1986. The defense case was presented between April 21 and July 28, 1986. Rebuttal evidence was offered by complaint counsel on July 29. The record was closed for receipt of evidence on August 29, 1986. During the hearings, counsel for all parties were given full opportunity to be heard and to cross-examine the witnesses. Both sides filed their main briefs and proposed findings on September 22, 1986; replies were filed on October 14, 1986.

After reviewing all of the evidence, as well as proposed findings and briefs submitted by the parties, and based on the entire record, including a determination of the credibility of witnesses (which took into account demeanor and the consistency between testimony prepared for litigation and the plain meaning of everyday business records), I make the following findings of fact:[2]

---

[2] Proposed findings not adopted in the form or substance proposed are rejected as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

CX (Complaint counsel's exhibits)
RX (Respondents' exhibits)

Joint Physical Exhibit A (JXA, 311 pages) is a compilation of relevant state title insurance statutes. Section 33-25-302 of the Montana Title

Insurance Act (cited at p. 184, Vol. I of respondents' main brief) does not appear in JXA but the entire text is quoted in note 269, *infra*. Testimony is cited by the name of the witness followed by the transcript page as in DiSanto 2738-41. CX 1 and RX 1 are the indices required by § 3.46(b) of the Commission's Rules.

Respondents requested *in camera* treatment for certain exhibits, and after an adequate justification was made pursuant to § 3.45 of the Rules, it was ordered that these exhibits were to be segregated and placed in an *in camera* file. The *Omnibus In Camera Order* issued on February 10, 1986, which governs all *in camera* exhibits, provides as follows:

> It should be clearly understood that nothing contained in this Order in any way limits the public use of this material in decisions written by the Administrative Law Judge, the Commission, or reviewing courts. While I have no intention of making unnecessary disclosures, whether or not to publish in my Initial Decision all or part of the material contained in *in camera* exhibits must be left solely to the discretion of Administrative Law Judge, and I must reserve the right to exercise this discretion without consulting any party or third party.

The *Omnibus In Camera Order* also provides that documents shall be removed from the *in camera* file three years after the date on which the record was closed—that is, on August 29, 1989.

The appearances of the witnesses were as follows:

Name	Called By	Transcript Pages
Lawrence F. Anito, Jr. (Independent Attorney and Attorney-Agent for Respondents Ticor and First American)	Complaint Counsel ("c.c.")	248-348
Irwin E. Cooper (Independent Attorney and Attorney-Agent for a non-respondent title insurer)	c.c.	357-430
Albert F. Quadraccia (Agent for a non-respondent title insurer)	c.c.	486-530
Robert A. Fraundorf (Bureau Chief, Licensing, Idaho Department of Insurance)	c.c.	3425-3453

Name	Called By	Transcript Pages
Gerald L. Ippel (President, Respondent Ticor)	Respondents ("resp.")	608-706
Albert D. Malaker (Great Lakes Regional Counsel, Respondent Chicago Title)	resp.	707-836
Mark W. Sinkhorn (Ohio State Counsel, Respondent Lawyers Title	resp.	843-934
Michael J. Fromhold (Senior Associate Title Counsel, Respondent Ticor)	resp.	941-1034
Michael F. Waiwood (Agent for Respondent Ticor)	resp.	1040-1128
Perry J. Armstrong (Agent for Respondent Ticor)	resp.	1134-1182
Thomas F. Ferraro (Vice President, Respondent Chicago Title)	resp.	1185-1245, 2298-2368
Joseph C. Bonita (Vice President, Respondent Ticor)	resp.	1251-1309
Erich E. Everbach (General Counsel, Respondent Ticor)	resp.	1311-1418
Robert B. Holtom (Independent Insurance Consultant and Expert)	resp.	1429-1601
Leonard C. Donohoe (General Counsel, Respondent Chicago Title)	resp.	1610-1685
Donald E. Grabski (Vice President, Respondent Lawyers Title)	resp.	1686-1732
Norman J. Wirtz (Insurance Rate and Forms Analyst, Property and Casualty Section, Wisconsin Office of Commissioner of Insurance)	resp.	1738-1827

Name	Called By	Transcript Pages
Joseph M. Clayton (Deputy Manager, New Jersey Land Title Rating Bureau)	resp.	1828-1879
Neil A. Bethel (A Principal Owner, Tillinghast, Nelson & Warren, an insurance actuarial consulting firm)	resp.	1885-2037
John B. Wilkie (President, Respondent Lawyers Title (Arizona))	resp.	2055-2144
Deloris Williamson (Chief Deputy Director, Property and Casualty Section, Arizona Department of Insurance)	resp.	2167-2216
Emil L. Barberich (Market Conduct Examiner, Arizona Department of Insurance)	resp.	2222-2297
Irving H. Plotkin (Title Insurance Rate Expert, Arthur D. Little)	resp.	2376-2566 2573-2718
Waldo R. DiSanto (Director, Property and Casualty Division, Connecticut Insurance Department)	resp.	2724-2823
Walter S. Bell (Examiner, Property and Casualty Division Connecticut Insurance Department)	resp.	2824-2847
Robert L. Statton (Vice President, Respondent SAFECO)	resp.	2853-2874
Robert C. Mitchell (Vice President, Respondent SAFECO (Idaho))	resp.	2875-2952
Norman T. Smith (Executive Director, Ohio Title Insurance Rating Bureau)	resp.	2958-3046

II

FINDINGS OF FACT

A. *IDENTITY OF RESPONDENTS*

1. Respondent insurers are engaged in the business of insuring the ownership of real estate for buyers and those lenders (mortgagees) who rely on real estate as security for their loans. As part of the package of services they offer, respondents provide search and examination and settlement or escrow services.[3].

2. Respondent Ticor Title Insurance Company ("Ticor") is a corporation organized under California law, with its principal place of business located at 6300 Wilshire Boulevard, Los Angeles, California 90048.[4] Ticor, which conducts its title insurance business in 49 states and the District of Columbia, maintains approximately 300 branch offices and has over 5,000 employees.[5] For the

Name	Called By	Transcript Pages
Peg Ising (Assistant Chief, Property-Casualty Division, Ohio Department of Insurance)	resp.	3047-3068
Robert L. Ratchford (Former Director, Ohio Department of Insurance)	resp.	3069-3102
Robert T. Haines (Former General Underwriting Counsel, Respondent Chicago Title)	resp.	3107-3243
Marvin C. Bowling, Jr. (Executive Vice President (Law), Respondent Lawyers Title)	resp.	3265-3420

[3] CX 156z-2, z-4, CX 247F-G, CX 250H-"T", CX 293D.

[4] Complaint and Ticor's Answer, ¶ 2. Prior to 1982, Ticor was known as Pioneer National Title Insurance Company. CX 164A.

[5] CX 165B.

year ending December 31, 1983, Ticor reported income of $219,869,518 from title insurance premiums and $62,488,172 from other sources.[6].

3. Respondent Chicago Title Insurance Company ("Chicago Title") is a corporation organized under Missouri law, with its principal place of business located at 111 W. Washington Street, Chicago, Illinois 60602.[7] Chicago Title, which conducts its title insurance business in 49 states and the District of Columbia, maintains approximately 150 branch offices.[8]. For the year ending December 31, 1983, Chicago Title reported income of $205,525,412 from title insurance premiums and $51,713,074 from other sources.[9]

4. Respondent SAFECO Title Insurance Company ("SAFECO") is a corporation organized under California law, with its principal place of business located at 13640 Roscoe Boulevard, Los Angeles, California 91409.[10]. SAFECO, which conducts its title insurance business in 46 states and the District of Columbia, maintains branch and agency offices throughout the United States.[11] For the year ending December 31, 1983, SAFECO reported income of $163,088,978 from title insurance premiums and $29,713,045 from other sources.[12].

5. Respondent Lawyers Title Insurance Corporation ("Lawyers Title") is a corporation organized under Virginia Law, with its principal place of business located at 6630 West Broad Street, Richmond, Virginia 23230.[13]

[6] CX148z-52, CX258.

[7] Complaint and Chicago Title's Answer, ¶ 3.

[8] CX167B.

[9] CX149z-28.

[10] Complaint and SAFECO's Answer, ¶ 4.

[11] CX169.

[12] CX150z-22.

[13] Complaint and Lawyers Title's Answer, ¶ 6.

Lawyers Title conducts its title insurance business through approximately 2500 branch and agency offices located in 49 states and the District of Columbia.[14] For the year ending December 31, 1983, Lawyers Title reported income of $98,302,394 from title insurance premiums and $16,395,472 from other sources.[15]

6. Respondent Stewart Title Guaranty Company ("Stewart") is a corporation organized under Texas law, with its executive offices located at Stewart Building, Galveston, Texas 77550.[16] Stewart conducts its title insurance business in 45 states and the District of Columbia through regional, district, and state offices.[17] For the year ending December 31, 1983, Stewart Title reported income of $97,443,521 from title insurance premiums and $3,382,457 from other sources.[18]

7. In 1982, respondents Ticor, Chicago Title, SAFECO, Lawyers Title, and Stewart, collectively accounted for 57 percent of the $1.35 billion title insurance industry. Ticor with 16.5 percent of the market, Chicago Title with 12.8 percent, Lawyers Title with 12 percent, and SAFECO with 10.3 percent, are the four largest title insurers. First American Title Insurance Company, a named respondent which has a consent settlement agreement pending before the Commission, is the fifth largest title insurer with 9.7 percent of the market. Stewart, which accounts for 5.4 percent of the market, is the eighth largest title insurer.[19]

[14] CX173.

[15] CX152z-84.

[16] Complaint and Stewart's Answer, ¶ 7.

[17] CX174B.

[18] CX153z-22.

[19] Market shares are measured in terms of gross operating revenues. CX166z-3. See also CX293E. While Stewart's national market share is relatively small, it is the leading title insurer in Texas and it is strongly positioned in the West and Southwest. CX293G.

B. *COMMERCE*

8. Respondent insurers write policies and provide search and examination and settlement services in all states except Iowa, which has a statutory prohibition against issuing title insurance.[20]

9. The search and examination of title and the issuance of title insurance policies are integral parts of interstate real estate transactions in which loans either cross state lines or are guaranteed by agencies of the United States located in Washington, D.C. Typically, these lenders or loan guarantors require that the title to the real estate securing the loan be searched and examined, and that a title insurance policy be issued.[21]

10. Similarly, the settlement services provided by respondents are part and parcel of interstate real estate transactions.[22]

11. Respondents offer their search and examination and settlement services through nationwide networks of regional, divisional, and branch offices, which are subject to and benefit from the financial support, control, direction, policies, and national advertising and marketing campaigns of respondents' home offices.[23]

---

[20] CX171.

[21] Haines 3231, Bowling 3316; CX 171, CX 182D, CX 196Z-136 to Z-137, CX 237T-W, CX 247C, CX 253Z-31 to Z-32, CX 303A; RX 431M.

[22] CX 155D, CX 196Z-60 to Z-74, CX 238F-G; RX 394Z-58 to Z-74, RX 409L, RX 427Z-135, RX 431Z-116 to Z-118.

[23] CX 247B; RX 413G, "T", RX 442F, RX 444J, L; see also Fromhold 955-56, Bonita 1253.

C. *TITLE, THE ABSTRACT OF TITLE, THE ATTORNEY'S OPINION, TITLE INSURANCE*

Real Estate Title

12. Title is a legal concept covering the bundle of rights possessed by the owner of real property. These rights, which are recognized and protected at law, include possession, use, control, enjoyment, and the power to transfer the property.[24]

13. In real estate transactions in which title is to be transferred, buyers are interested in determining whether there are any title defects in the form of liens, encumbrances, easements, convenants, restrictions, or claims that might interfere with the quiet enjoyment of possession. This translates into the buyer's need to know if a seller's title is limited or affected by such pre-existing rights or interests of others as the right of a utility company to maintain a right-of-way across the property, or the marital rights of a prior spouse of the seller, or the ability of an adjoining landowner to invoke a restrictive covenant, or the existence of enforceable mortgages, use restrictions, tax judgments, mechanic's liens, and other liabilities, limitations, charges, or liens.[25]

14. Similarly, the interest of a mortgagee involved in a real estate transaction centers around his need to know of the existence of any clouds on title that may adversely effect the priority of his own lien.[26]

15. Historically, there have emerged several ways of assuring buyers and lenders of the existence of good title (see Findings 16-39).[27]

---

[24] CX 155"T", CX 253Z-3; RX 409Z-32.

[25] CX 87X-Y, CX 253Z-3; RX 431M. By custom, the cost of a title evidence is borne by the buyer. RX 436C.

[26] CX 156Z-62 to Z-63, CX 237T-W.

[27] See also CX 253Z-3 to Z-4, Z-9; RX 409Z-32.

The Abstract Of Title

16. The earliest evidence of good title (which persists to the present day) was provided by title searchers (sometimes called "abstractors") who originally were in the business of researching public records and providing purchasers or lenders with a summary (called the "abstract of title") of all the documents forming a chain of title.[28]

17. The purpose of the abstract of title was to arrange in chronological order all pertinent information respecting title that appeared on the public record, the assumption being that the buyer or lender would then either cure the revealed defects or decide not to go forward with the purchase or loan.[29]

18. If in making a purchase or loan decision, the buyer or lender relied on what turned out to be an incomplete or inaccurate abstract, the abstractor was only liable for negligent failure to exercise the level of vocational skill expected of title searchers in the locality where the search was conducted. In the absence of proof of negligence, the abstractor was not liable for mistakes, errors, or omissions in the search.[30]

19. The negligence liability of the abstractor only attached to errors and omissions in searching public records. The abstractor had no liability for failure to uncover unrecorded defects in title.[31]

20. Over the years, the abstracting business developed several refinements. First, abstractors began to issue "certificates of title," which certified that title vested as shown

[28] Bowling 3335; CX 87Z-114 to Z-119, CX 154C-E, CX 155C, CX 156V, Z-29, Z-234, CX 249D, CX 253Z-4 to Z-5, CX 261F-G, CX 310B-C; RX 409C, RX 427Z-132, RX 433.

[29] CX 189F, CX 253Z-4 to Z-5.

[30] CX 91Z-36, CX 246E, CX 253Z-5 to Z-6.

[31] CX 253Z-6, CX 261F-G.

in the documents searched; still later, abstractors actually guaranteed title and set aside cash reserves to assure their capability for paying losses.[32]

21. Presently, the abstract of title is rarely sold to a buyer or lender who relies on it in lieu of the other, more widely used evidences of good title such as an attorney's opinion or title insurance.[33]

22. Typically, the modern commercial abstract company performs it searches and examinations as an agent for an insurance company,[34] or it may be retained by an independent attorney, attorney-agent, or insurance company personnel who then examine the abstract before issuing an attorney's opinion or a title insurance policy.[35]

Attorney's Opinions

23. Since the abstract of title did not include an evaluation of the legal significance of the recorded documents, there eventually evolved a practice, which continues to this day, of submiting either original title records or abstracts to a qualified independent real estate attorney (sometimes called a "conveyancer") who makes a critical review of the records and then renders for buyers or lenders an attorney's opinion or a certification of title.[36]

[32] CX 154C-E, CX 155D, CX 253Z-5; RX 391D-E.

[33] Everbach 1414; CX 261F-G.

[34] Bowling 3336; CX 172F; RX 488H.

[35] Anito 293-95, Cooper 365-67, 370-72, Ippel 699, 702, Fromhold 954-55, Everbach 1341, Donohoe 1665, Bowling 3379; CX 87M, CX 91Z-35, CX 145A, CX 175B, CX 237Z-2, CX 245B, CX 261F-G. Because the work of the abstractor is directly affected by local real estate laws and customs, the present-day commercial abstract company is usually a small, locally-owned business. CX 261R-S.

[36] Everbach 1314; CX 154D, CX 156Y to Z-1, CX 175B, CX 182E-F, CX 189Z-15 to Z-16, CX 196Z-136, CX 253Z-5 to Z-6, CX 262E-F; RX 391E. If the attorney conducts the search himself, he issues a certification of title. CX 156Y to Z-1.

24. These independent real estate attorneys are also retained by title insurers or their agents for the purpose of providing an attorney's opinion prior to the issuance of a title insurance policy.[37]

25. Like the abstract, the main purpose of the attorney's opinion is to give the buyer or lender a full accounting of any title defects so that an informed decision can be made as to whether to attempt to cure the revealed defects or to just drop the deal. The attorney's opinion merely adds to the abstract an interpretation of the legal significance of documents uncovered in the search.[38]

26. The attorney's opinion, like the simple abstract, carries with it limited liability for errors or omissions, amounting essentially to malpractice liability grounded on negligence or failure to meet the accepted standard of professional legal competence in the locality where the attorney's opinion was given.[39] If the attorney conducted the search himself, he is liable for negligence in both the search and examination. In those instances, however, in which the attorney's opinion is based on an abstract prepared by an abstractor, his liability is limited to due care in the preparation of an opinion based on the information reviewed.[40]

27. Also, as is the case of the abstract, an attorney rendering an attorney's opinion is not liable for either hidden defects not discoverable by a diligent record search or for inaccuracies in the public records.[41]

---

[37] CX 172F; RX 488H.

[38] Cooper 368-69; CX 189Z-15 to Z-16; RX 489E-F.

[39] Anito 281; CX 182D, CX 196Z-136, CX 237P-R, CX 253Z-5; RX 489D.

[40] Ippel 659, Everbach 1325-26; CX 196Z-136, CX 253Z-5, CX 261F-G.

[41] Anito 281; CX 182E-F, CX 246E, CX 253Z-6 to Z-7.

28. The liability of the attorney for his opinion is also limited by his solvency, and ends with the death of the attorney or the tolling of a statute of limitations.[42]

29. A variation of the attorney's opinion is the so-called "bar fund"; in effect, a title insurance company organized by independent attorneys who then issue policies based upon their own searches and examinations.[43] Bar funds, which offer an additional layer of protection beyond the attorney's opinion or the simple abstract by covering losses from hidden defects, were organized as the bar's answer to loss of search and examination business to title insurance companies.[44]

Title Insurance

30. The origin of title insurance as a form of evidence of good title traces to a 1863 Pennsylvania case, ***Watson v. Muirhead***, 57 Pa. 161 (1868), which held that an attorney rendering an attorney's opinion was liable only for negligence. The negligence standard of ***Watson*** imposed a significant barrier to recovery for errors or omissions made by abstractors or attorneys in conducting a title search and examination.[45]

31. Title insurance (technically, an agreement to indemnify an owner or mortgagee for loss or damage sustained by reason of a defect in title not explicitly excluded

---

[42] CX 196Z-136, CX 237P-R, CX 246E, CX 253Z-6 to Z-7; RX 489D

[43] Ferraro 2319-23; CX 196Z-153 to Z-155. In Connecticut, however, the bar fund is not regulated by the state insurance department. Ferraro 2319-23.

[44] Ferraro 2319-23. As it happens, title insurers themselves, like respondent Lawyers Title, have been formed by lawyers who specialized in real estate work. RX 456F.

[45] Everbach 1326-28; CX 237P, CX 310B-D; RX 391D-H, RX 417Z-32.

or excepted from the policy) was designed to go beyond either the abstract or the attorney's opinion by imposing on insurance companies liability for errors in the conduct of the search and examination irrespective of any negligence in carrying out the process.[46]

32. Title insurance covers errors or mistakes made by those who perform the search and examination on behalf of the insurer whether or not they are agents, independent contractors, or employees (see Findings 40-57).[47]

33. Title insurance in its present form also exceeds the protection given by abstracts or attorneys' opinions in that it survives even if the person who conducted the search and examination dies.[48]

34. Unlike the abstract or an attorney's opinion, title insurance includes the obligation to defend in the event that an insured is sued.[49]

35. Like the abstract and the attorney's opinion, however, title insurance policies are basically assurances to the buyer or lender that defects in title discoverable from examining the public record have been brought to the attention of the buyer or lender so that they can cure the defect or decide not to go ahead with the deal.[50]

36. A secondary purpose of title insurance, developed over the years and going beyond the scope of the abstract or attorney's opinion, is to protect the buyer or lender from hidden or so-called "off-record" risks not discoverable from examination of public records such as

---

[46] CX 155"T", CX 196Z-136, CX 319B; RX 417Z-31, RX 491A.

[47] See also Bowling 3363; CX 182E.

[48] CX 196Z-136, CX 237P.

[49] CX 182E, CX 253Z-9; RX 417Z-31.

[50] See Findings 58-59.

forgery, missing heirs, previous marriage, impersonation, or confusion in names.[51]

37. Title insurance is largely a post-World War II phenomenon whose growth reflects the need for a standardized form of assurance of good title to complement standardized mortgages that are resold in a nationwide secondary mortgage market.[52]

38. While title insurance is now the predominant form of title evidence, the attorney's opinion is still commonplace especially in the New England and Southeastern states.[53] As indicated in Findings 21-22, the abstract of title is now rarely used alone as an evidence of good title, and instead usually serves as the basis for issuing either an attorney's opinion or the report that precedes the issuance of a title insurance policy.[54]

39. Viewed from a market perspective, the search and examination of title is a service business acquired by respondents and other title insurers as a result of their aggressive merchandising of title insurance (at the expense of

---

[51] CX 82V-W, CX 87Y to Z-1, Z-25 to Z-26, CX 154E-F, CX 182E-F, CX 237P, CX 261"T"-K; RX 391F-H. There are several major areas (which may be viewed as off-record risks) that are excepted from the standard coverage, such as easements and liens not shown on the public record (see Finding 87 and CX 250H).

[52] Ippel 699-700; CX 91Z-37 to Z-38, CX 182D, F, CX 189Z-17, CX 196Z-136 to Z-137.

[53] Ippel 699, Everbach 1411-17, Bowling 3367; CX 154D, CX 189F, CX 261F-G, RX 391E, RX 436C.

[54] Ippel 701-02, Fromhold 954-55, 1005; CX 87M, CX 156Z-2, CX 175B, CX 237Z-2; see also Finding 81.

abstracts and attorneys' opinions) as a superior way of evidencing good title.[55]

D. Attorney-Agents, Approved Attorneys, and Employees of Title Insurers

40. As indicated in Findings 22 and 24, a title insurance policy may be based on a search and examination conducted by an independent abstractor or an unaffiliated independent attorney. Most title insurance policies, however, are issued after the search and examination has been made by either attorney-agents, approved attorneys (a variation of the independent attorney), or employees of respondent insurers (see Findings 41-57).

41. It is a common practice in the title insurance industry for searches and examinations to be conducted by attorneys who have been designated as agents of title insurers.[56] These attorney-agents often are recruited from the ranks of independent attorneys (see Findings 23-28) who formerly rendered attorneys' opinions or issued certificates of title.[57]

42. Agents for title insurers have also been drawn from the body of independent commercial abstractors who own title plants,[58] and who may continue to offer

[55] Ippel 699-700, Ferraro 1219, 1239-41, Donohoe 1664-65, 1667-68, Bowling 3293; CX 87W to Z-8, CX 154A-H, CX 156Z-2, CX 182D-F, CX 189Z-16, CX 196Z-150 to Z-151, CX 236E, CX 237P-W, CX 246A-L, CX 249D, CX 253Z-3 to Z-11, CX 261H, CX 262E-G, CX 292D-E, CX 311A-J, CX 312B, CX 313B, CX 319A-B; RX 312, RX 391D-H, RX 394Z-31, RX 475-RX 475E, RX 476A, RX 484A, RX 489D-E.

[56] Ippel 698; CX 182G-H; RX 444N, RX 491A-B.

[57] Ferraro 1241; CX 182G-H.

[58] Armstrong 1135, Everbach 1341, Bowling 3376; CX 228A.

abstracting services apart from their work as agents for title insurers.[59]

43. Agents, whether they are attorneys or abstractors, are liable (like the independent attorney rendering an attorney's opinion) to the title insurer for negligence in conducting the search and examination.[60]

44. The relationship between agents (especially attorney-agents) and title insurers is fraught with opportunities for directing the placement of title insurance business. While ostensibly acting as independent legal counsel to a usually uninformed buyer, the attorney-agent is in a position to channel the consumer's title insurance business to the agent's insurer-principal in exchange for commissions, commonly referred to in the title insurance business as "agent's retention" since the agent collects and transmits the premium less his "retention" to the insurer. The agent's retention, however, includes not only the actual cost of conducting the search and examination, but may also reflect his ability to negotiate for a large part of the total insurance premium (as much as 90 percent) on the basis of his strategic position in the real estate transaction.[61] In point of fact, the growth of a title insurer

[59] Ippel 698, Armstrong 1135.

[60] Cooper 388; CX 145C, CX 146D; RX 410J. The willingness of respondent insurers to test agent liability is tempered by the strategic importance of agents in garnering insurance business. Bowling 3300-02, 3311; RX 487N-Q; see also Finding 44.

[61] Anito 279, Sinkhorn 917-18, Armstrong 1165, Ferraro 1241-42, Plotkin 2681-84, 2705-12, DiSanto 2737-40, 2799-2808, Bowling 3301; CX 30Z-85, CX 145E, CX 156Z-7, CX 182G-H, CX 232G, CX 247X-Y, CX 257A, CX 278W-X, CX 301B, CX 306B, CX 307B, CX 323J, CX 324L, CX 333Z-11 to Z-15, CX 334C-D; RX 3E, RX 23K-L, RX 32, RX 114, RX 502Z-55.

is largely tied to its ability to solicit and retain attorney-agents who can influence the placement of business.[62]

45. "Approved attorneys" are independent attorneys who have been formally designated by respondent insurers as qualified to conduct a search and examination prior to the issuance of a title insurance policy.[63]

46. An approved attorney, who often will graduate to the attorney-agent status described in Findings 41-44,[64] may also continue to function as an unaffiliated independent attorney, and in that capacity conduct searches and examinations and issue opinions and certificates for individual buyers or sellers or even other insurance companies which have not designated him as an approved attorney.[65] Moreover, an attorney may function as an approved attorney for one insurer and an attorney-agent for another.[66]

47. An approved attorney is neither an employee nor an agent of the title insurer which designated him as an approved attorney.[67]

---

[62] Ferraro 2356-57, Plotkin 2698-99, Bowling 3301; CX 166R, CX 237Z-3, CX 293E.

[63] CX 160G-H; RX 410L-M, RX 491A.

[64] CX 182G-H. Approved attorneys (usually lawyers with a real estate practice) are often selected on the basis of their ability to influence the placement of title insurance business. Bowling 3367. From the approved attorney's standpoint, the relationship is desirable because not only may they graduate to the status of an attorney-agent (and the prospect of large "retentions") but as an approved attorney he can expect to receive substantial fees from conducting searches, examinations, and settlements (DiSanto 2806, Bowling 3368; CX 30Z-85; RX 410L) as well as whatever other advantages accrue from being identified with a national title insurance company in professional directories. Sinkhorn 878.

[65] Cooper 364-70.

[66] Cooper 370.

[67] RX 491A.

48. The approved attorney may perform the search himself or base his examination upon the abstract of an independent abstractor.[68]

49. The approved attorney's analysis, which is indistinguishable from the attorney's opinion or certification of the ordinary independent attorney (see Findings 23-25), is relied upon by the insurer or the agent of the insurer in issuing initially a binder or commitment, and eventually a title insurance policy (see Finding 80).[69]

50. The approved attorney, however, unlike the attorney-agent prepares neither the preliminary binder leading up to the issuance of the title policy nor the title policy itself.[70]

51. The approved attorney, like any other independent attorney rendering an attorney's opinion for an insurer or an insurer's attorney-agent, is liable to the insurer for failure to exercise due diligence and reasonable professional skill in the search and examination of public records.[71]

52. If the approved attorney's examination of title is not based on his own search but rather upon a commercial abstract, liability is limited to the exercise of reasonable care and due professional skill in rendering an opinion in light of the information contained in the abstract.[72]

53. The approved attorney receives no financial remuneration from the title insurer. The approved at-

---

[68] CX 160G-H.

[69] Sinkhorn 928-29, Fromhold 953, 1021, Clayton 1838, Bowling 3371-72; CX 155D, CX 160G-H, CX 182G, CX 237Z-9 to Z-10; RX 3E.

[70] CX 132F, CX 160G, CX 182G, CX 196z-11 to Z-12; RX 410L, X to z-1, RX 491A.

[71] CX 160G, CX 237z-9 to Z-10, CX 257A.

[72] CX 160G-H.

torney bills his client – the buyer or the lender – for the cost of conducting the search and examination.[73]

54. Respondent insurers do not set, either jointly or separately, the fee that the approved attorney charges his client. The approved attorney sets his own fees.[74]

55. In addition to approved attorneys and attorney-agents, searches and examinations are conducted by employees of respondent insurers stationed in respondents' branch offices.[75]

56. The mix of attorney-agents, approved attorneys, and direct employees not only varies according to custom and geography, but also reflects how successful a particular title insurer has been in enlisting the support of well-established attorneys who can influence the placement of their client's insurance business.[76]

57. Essentially all title insurers operate in the same way, and while there may be differences among respondent insurers as to how business is allocated among employees, agents, and approved attorneys, the practices and policies described in these findings are fairly attributable to all respondents.[77]

[73] CX 30Z-85, CX 160G, CX 182G; RX 3E.

[74] Fromhold 1020-22, Bowling 3363-64; CX 30Z-85.

[75] CX 87M, CX 175C, CX 237Z-2; RX 488H.

[76] Ippel 624; CX 237Z-3 to Z-4, CX 262"T"; RX 491A; see also Finding 44. The mix may also reflect the intensity of the competitive struggle between attorneys and insurance companies for the search and examination and settlement business. In some areas, respondent insurers may have been compelled to use their own employees because of organized bar opposition to having independent lawyers work as insurance company agents or approved attorneys. See CX 196Z-150 to Z-15L.

[77] See Bowling 3374-75.

E. THE SEARCH AND EXAMINATION PROCESS FOR ABSTRACTS OF TITLE, ATTORNEYS' OPINIONS, AND TITLE INSURANCE

58. Irrespective of the form in which the buyer or lender are assured of good title (i.e., through abstracts, attorneys' opinion, or title insurance) and irrespective of the hat worn by the searcher and examiner (abstractor, independent attorney, attorney-agent, approved attorney, or insurer's employee) the condition of the title is determined by the same search and examination process.[78] The process is the same because in all cases the objective is the same – to uncover significant impediments to ownership.[79]

59. Neither the use by respondents and their agents of insurance jargon to describe the purpose of their searches and examinations – in their view to determine what risks they are willing to insure[80] – nor the existence of state statutory requirements conditioning the issuance of a title insurance policy upon the conduct of a search,[81] materially changes the nature of the search and examination conducted prior to the issuance of an insurance policy as compared to the process used before an abstract or an

[78] Anito 280-81, Cooper 370-72, 383, Fromhold 1003-04, Haines 3234-35; CX 155D, CX 172F, CX 182G, CX 237Z-9 to Z-10, CX 244"O"-R, CX 245B, CX 247"T", CX 249D, CX 250G, CX 310"T", RX 290A, RX 488H. While the searches and examinations conducted by an independent attorney, approved attorney, and attorney-agent are identical and indeed the same person may wear all three hats, the record indicates that the standard abstract is more detailed than the typical product of the independent attorney, approved attorney, or attorney-agent (see Findings 16-17, 81).

[79] Everbach 1395-96; CX 87M, Z-10 to Z-11, CX 175B-C, CX 182E-F, CX 247F-G, CX 253Z-3 to Z-4, CX 261J-K, CX 262C-D, CX 301B, CX 302B, CX 308B; RX 394Z-47.

[80] Ippel 627, Malaker 745-47, Fromhold 1033, Waiwood 1079, Everbach 1329, Bowling 3337.

[81] See, e.g., JXA, p. 111.

attorney's opinion are rendered. In all instances, the objective of the searchers and examiners is to provide a statement of the status or condition of title, and to call the attention of the buyer or lender to defects discoverable from the public records so that these clouds on title are corrected before the purchase is made, or if the risks are too great, to call the deal off.[82] In the words of respondent Ticor:

> Basically, title insurance is the company's opinion of the ownership and marketability of title to a particular parcel of real property. This can only be ascertained after a thorough and complete search of all the records affecting title to the parcel insured. This search is much more extensive and requires more time than any other investigation conducted in connection with the issuance of other forms of insurance.
>
> A title company is required, not only by law, but in order to make quick and accurate searches, to keep complete records covering all the lands in a particular county. A title company is a service organization and performs a service for those interested in buying, selling and loaning money on real estate. One may make his own search because all of the records necessary to complete such a search are available at the Court House, the City Hall and the Federal Court House. How this search is made and the accuracy of such a search will depend upon an individual's skill, knowledge and perseverance. It could take days, weeks or months, and after completion, the verdict would be inconclusive because with the passage of time, additional filings have been made which have to be considered and construed. This task would be akin to trying to dig away a hill of sand which slides continuously. Through a system of records, kept on each individual parcel, the title company is able to complete this search on a definite date with certainty. When you purchase a title insurance policy, you are buying the services of experts. The company is willing to back the opinion of these experts with the additional feature of insurance. Hence, the use of the word insurance, when naming the product of title insurance.[83]

[82] Anito 265-67, Cooper 421, Quadraccia 490, Sinkhorn 887-89, Fromhold 970, 1033, Waiwood 1103, Haines 3224-25, 3240-43, Bowling 3335; CX 87H-J, N, Z-10 to Z-11, CX 91Z-35, CX 175C, CX 194, CX 236B, CX 246G, CX 247D-G, CX 249D, CX 252S, CX 253Z-9 to Z-10, CX 261"T"-K, CX 262C-D, CX 293D, CX 294D-E, CX 297, CX 298B, CX 299B, CX 311"T", CX 318B, CX 320Z-157 to Z159; RX 3D, RX 396C, RX 413D, RX 417Z-34, RX 431M-N, RX 488"T".

Title Search

60. Whether the ultimate product is an abstract, attorney's opinion, or title policy, the first part of the search and examination process—the search—proceeds on the basic premise that important interests in real property (deeds, mortgages, leases, grants, easements, judgments, tax liens) must be made a matter of public record by recording the document in the county recorder's office where the property is located.[84]

61. By recording evidence of a claim or interest in real property, legal or "constructive" notice is given—that is, all persons, including prospective buyers and lenders, are presumed to know what is in the public records even though they do not have actual knowledge.[85]

[83] CX 250G. See also CX 308B ("Title Insurance combines the function of the abstractor, in making the chain of title, and the attorney in his examination of the title, plus coverage to the land owner in the form of insurance.")

[84] CX 155"T", CX 156Z-32 to Z-33, CX 175B, CX 196Z-16, CX 247E; RX 389Z-245 to Z-253, RX 413C, RX 431N-P.

[85] CX 156Z-32 to Z-33, CX 247E, CX 253Z-3 to Z-4; RX 413C.

62. From these public records, the searcher endeavors to establish a "chain of title," consisting of a chronological account of recorded instruments affecting title, beginning with the earliest and concluding with the latest.[86]

63. The "direct" search method of establishing the chain of title entails an examination of public records for all documents relating to the property in question.[87] Historically, the presumptive search period is 60 years, but depending upon local custom or the existence of an earlier, reliable title policy, or a marketable title act, the search may be considerably shorter.[88] In an especially complex transaction, the search may go well beyond 60 years to the issuance of the original patent by the sovereign.[89]

64. Typically, the public records searched include county land records (deeds, easements, and mortgages) municipal records covering sewer, sidewalk, and other assessments, tax collector records, and state and federal court records showing bankruptcies, divorces, judgments, and civil actions indicative of liens or other enforceable interests in the property.[90]

65. Instead of starting with public records, which often are not efficiently organized, a search (especially in

[86] Sinkhorn 852-53, 856-58, Haines 3158-59; CX 196Z-16; RX 409K, RX 427Z-135, RX 431N-P.

[87] CX 196Z-16 to Z-18; RX 409Z-26, Z-33.

[88] Anito 291-93, Quadraccia 510-11, Ippel 704-05, Malaker 723-26, 743-44, 792-93, Sinkhorn 853-55, 923-24, Waiwood 1053-54, Armstrong 1147-48, Ferraro 1198; CX 87Z-32 to Z-33, CX 160M-N, CX 196Z-18, CX 223A, CX 294D.

[89] Quadraccia 511; CX 160M-N, CX 196Z-18, CX 223A. If a searcher has confidence in the work of a particular abstractor, he may begin the search from the point in time when the abstract ended. CX 196Z-19.

[90] Anito 254, 262-63, Malaker 722, 728-30; CX 196Z-17 to Z-18, CX 247G.

large metropolitan areas) may be initiated by use of a privately owned "title plant" or "abstract plant." A title plant contains virtually complete summary information (as well as some reproductions) from the public records affecting real estate title in a limited geographic area, organized and indexed in a way that enables a title search to be performed in a fraction of the time and with greater accuracy than a direct search of the public records.[91]

66. Title plants are owned and operated by abstractors, attorneys, real estate brokers, and title insurers or their agents.[92]

67. Still another method of conducting a title search is to go back no further than a pre-existing title policy or a pre-existing abstract.[93]

68. There are no special educational or training requirements for becoming a title searcher, and with training and experience, high school graduates soon acquire the expertise necessary to move from routine searches to more complex assignments.[94]

[91] CX 196Z-19, CX 261L-M; RX 401Z-21 to Z-24, RX 409Z-33, RX 427Z-132, RX 488H.

[92] CX 196Z-36; RX 290A, RX 335, RX 401Z-21 to Z-24. In some areas of the country, title plants are cooperative efforts operated by several title insurers or their agents. CX 196Z-54 to Z-55.

[93] Anito 251-53, 270-72, 287-89, Quadraccia 510, Waiwood 1055-56, 1097-98, 1121-22, Armstrong 1146, Bonita 1267-68, Donohoe 1665; CX 196Z-19, CX 223A; RX 389Z-246.

[94] Fromhold 973, Armstrong 1179; CX 172F. See also Armstrong 1151 for testimony that searchers simply pull every document that is even remotely relevant "and then leave it to the examiners or at least the head searcher to throw them out or not" and CX 196Z-36 where one respondent describes the work of a searcher as "akin to drudgery."

Examination

69. The examination phase of the search and examination process involves a critical analysis or interpretation of the condition of title as revealed in the documents uncovered by the search.[95]

70. Examination may be done by approved attorneys, attorney-agents, independent attorneys, searchers, or anyone else who is experienced in interpreting title documents and is knowledgeable about real estate law.[96] Some examiners dispense entirely with a separate search and instead simply combine the search and examination in a single process.[97]

71. Similarly, while search is commonly identified as a separate and distinct process from examination by title insurers, and in large insurance company or agency offices the two processes are often performed by separate staffs, in the smaller officers, and in matters involving complex questions of title, the two processes tend to merge.[98]

F. SEARCH AND EXAMINATION AND RISK ASSUMPTION

72. Respondents' retained insurance expert,[99] as well as respondents' officers and agents, argued that search and

[95] Anito 264; CX 155F, CX 156Y, Z-2, CX 160G-H, CX 237M, CX 244S, CX 249D, CX 253Z-5, CX 262"O"; RX 401Z-30 to Z-34, RX 405D.

[96] CX 262"O".

[97] CX 87M, CX 253Z-5, CX 262F.

[98] Anito 297, Ippel 631, 635-36, Malaker 720, Fromhold 978-79, Waiwood 1049-50, Ferraro 1200, Bonita 1260-62, Bowling 3336; CX 196Z-36, CX 237M.

[99] The opinions of the retained expert, Robert Holtom, were uninformed by any experience whatsoever with title insurance. Holtom 1493, 1594.

examination undertaken prior to the issuance of a title insurance policy is either "underwriting" or part of what they referred to as the "underwriting process" because it is on the basis of the search and examination that risk (chance of loss) is identified and a decision is made either to accept or reject it.[100] This effort of affixing the lofty "underwriter" label to searchers and examiners proceeds initially from the premise that all providers of information respecting the property to be insured must be engaged in "underwriting" (or, if you will, be part of the "underwriting process") although this expansive view of underwriting would of necessity embrace the abstractor, the independent surveyor, the approved attorney, and practically anyone else who gives insurers some information bearing on the subject of the policy, including presumably the insured himself who provides his name and a description of the property, and perhaps even the receptionist who records this information on the face of the policy.[101] Going beyond the illogic of this open-end definition, this endeavor to elevate searchers and examiners to the status of "underwriters" also fails to take into account the fact that the search and examination conducted for title insurance purposes is virtually indistinguishable from the process undertaken for the non-insurance (and concededly non-"underwriting") purposes of rendering abstracts or attorneys' opinions, and that irrespective of the purpose, search and examination is carried out by a corps of

[100] Ippel 629, Malaker 730, Fromhold 977, Waiwood 1067-68, Armstrong 1159, Bonita 1285-88, Everbach 1329-31, Holtom 1486-88, Haines 3174-81, Bowling 3294.

[101] Malaker 717-19, Fromhold 977-78, 1005, 1013-14, Everbach 1398-99, 1402-07, Holtom 1541-43, 1584-86, 1587-89, Haines 3196-97. See, e.g., Fromhold 977, 1108 and RX 413C for the pivotal roles played by the surveyor and abstractor (both independent contractors not connected with insurers) in the search and examination process.

searchers, abstractors, conveyancers, attorney-agents, and approved attorneys who move freely from one form of title evidence to another without any perceptible change in what they do.[102] Moreover, to the extent that respondent's expansive concept of underwriting rests on the assumption that searchers and examiners for title insurers have discretion about assuming risk, the record evidence is that in an industry in which standard forms predominate and company manuals have reduced most transactions to a set routine, this discretion is narrowly circumscribed.[103] This strained effort at rolling search and examination, underwriting, and risk into one ball of wax is also suspect on its face since the basic approach of respondents in conducting their title insurance businesses is not to assume any significant risks uncovered by searchers and examiners.[104] Finally, respondents' strained extension of the underwriter label to searchers and examiners is fundamentally unsound since the title policy, in contrast to casualty insurance, does not insure against the happening of some unforeseen future event, and while the searchers and examiners may bend every effort to eliminate risk by finding recorded title defects, they are not engaged in the underwriting function of assuming and spreading risk among a large universe of insureds.[105]

[102] See Findings 16-71. The occasional use of the "underwriter" title in respondents' manuals in no material way changes the way in which search and examination are conducted for a title policy as compared to the search and examination undertaken for any other evidence of title. See RX 401Z-27 to Z-34.

[103] See Findings 73-96 and CX 172F.

[104] See Findings 73-96, 99.

[105] Holtom 1496-98, 1505-06, Wirtz 1790-91; CX 56C-D, CX 82E, CX 87H-J, CX 116B-C, CX 156Z-2 to Z-4, CX 182D-E, CX 237Z-8, CX 250F, CX 253Z-10, CX 260H-"T", CX 262C-D, CX 292G-H, CX 294C-D, CX 3109D-F, CX 314B; RX 102Z-95 to Z-98, RX 417Z-32, RX 442; see also Findings 98, 114.

73. Consistent with respondents' guiding principle of not assuming risk, their primary objective before issuing a title insurance policy is in the conduct of an accurate search of the public title records for the purpose of uncovering possible defects which are to be cured by the insured or excepted from coverage.[106]

74. Also consistent with respondents' risk-avoidance approach are their company manuals, underwriting guides, and other directives, which are replete with admonitions that risks are to be excepted from coverage.[107] The testimony of respondents' officers and agents directed at diminishing the importance of these directives by claiming in effect that searchers and examiners have wide latitude in ignoring them,[108] is not credible. The insurer-agent contracts as well as the underwriting manuals, guides, and directives themselves instruct employees and agents that they are to be followed to the point that agents may be liable for damages if they are not followed.[109] It is also significant that while these materials are constantly being updated, no documents were offered by respondents indicating that the admonitions respecting risks have been

[106] CX 30Z-67, CX 91Z-85, CX 160H, CX 166Y, CX 172F, CX 175C, CX 237Z-8, CX 294C-D; RX 482B.

[107] CX 160H, CX 161Z-342, Z-358, Z-382, CX 184A-G, CX 192, CX 214, CX 215, CX 216, CX 219, CX 220, CX 237Z-8, CX 240, CX 241, CX 253Z-10; RX 444Q.

[108] See, e.g., Waiwood 1072-73, Armstrong 1161-62, Ferraro 1200, Haines 3123-25, 3146-49, Bowling 3331-33.

[109] CX 140B, CX 145B-C, CX 160H, CX 228A, CX 232C, CX 237Z-3 to Z-6, CX 309Z; RX 413L, RX 482A. See also Sinkhorn 903-04, Haines 3225-26, Bowling 3300-05 for testimony by respondent officials that agents are audited to determine whether they have complied with respondents' manuals and underwriting guidelines, and that the terms of the agent-insurer contracts must be observed.

significantly modified.[110] On the contrary, respondents' own witness acknowledged that the manuals, underwriting guides, and directives are meant to be followed, and are written in absolute terms because respondent insurers do not want their agents and employees, whose primiary function is to generate business, to be making risk decisions that could result in huge claims.[111]

The Title Report Or Binder

75. That the restrictions in respondents' manuals on risk assumption are followed (in the sense that searchers or examiners typically neither eliminate nor make any decision to insure over enforceable defects) is clearly demonstrated by the process for working up the standard form reports or binders provided to respondent insurers by the American Land Title Associatin (ALTA), and used whenever title insurance is being acquired, irrespective of how the responsibility for search and examination may have been allocated among agents, approved attorneys, or insurance company employees. These standard title reports (also referred to as commitments or binders) purport to show the condition of title as of the date of the

[110] Haines 3118-20, 3126. See also Haines 3124, 3139-40 for testimony that until guides are changed they should be taken literally and Statton 2872-73 for the statement that manuals are "a broad set of operating guidelines for specific questions that they [branches and regional offices] may have, to save them the time of calling the home office to find out what they should do." The suggestion advanced by respondents that the underwriting guides are only used by "a real green horn" (see, e.g., Haines 3123) is meaningless. While agents or employees may only consult the guides until they become familiar with the contents, it would be absurd to deny that the experienced agent or employee has not incorporated into his total experience the risk limitation admonitions to which he has been exposed from the start of his career.

[111] Fromhold 1000-01, Haines 3117, 3123-25.

search and examination, and are enforceable contracts constituting an agreement by the insurer to issue a policy subject to certain standard requirements and a standard limitation.[112] The standard requirements are the payment of the purchase price for the property, recordation of the deed, and payment of the title insurance premium. The heart of the title report, however, is a standard limitation in the form of a general notice that the policy will not insure against loss from any title defects listed on Schedule B of the title report, or any new title defect arising between the date of the report and satisfaction of the standard requirements.[113]

76. As a matter of strict rule, respondent insurers require that their agents and employees indicate all enforceable or even doubtful title defects, liens, and encum-

[112] Anito 265-66, Quadraccia 490, Ippel 662-63, Fromhold 1033, Waiwood 1078-79, 1099-1100, 1103; Armstrong 1165-66, Bonita 1276-77, Everbach 1324, Bowling 3268, 3337-38; CX 155D-E, CX 252S, CX 253Z-9 to Z-10, CX 297, CX 302B, CX 320Z-157 to Z-159, CX 342F; RX 3D, RX 417Z-34 to Z-35, RX 487F. Although respondents apparently prefer the designation "commitment" as a way of distinguishing the preliminary report from the abstractor's or attorney's statement of the condition of title, the search and examination is the same for report, binder, or commitment, and there is no evidence that the contents of these pre-policy documents change depending on what they are called. See RX 400Z-84 to Z-95. By the same token, notwithstanding the similarity between a title report and an attorney's opinion, respondents scrupulously avoid the attorney's opinion designation since its use might bring a charge of unauthorized practice of law. Everbach 1328-29, Bowling 3293-94.

[113] CX 252S; RX 420Z-4 to Z-10. Schedule B of the title report contains two sections: section 1 specifies those acts, such as paying off an existing mortgage, that must be performed before the policy issues; section 2 lists the matters which will constitute exceptions on Schedule B of the final policy. CX 222Z-90.

branches on Schedule B of the title report.[114] Thus the title report issued by the attorney as an agent for an insurer is virtually indistinguishable from the attorney's opinion or certification that is issued by the same attorney when he is not acting as an insurance company agent.[115]

77. Respondents' officers and agents made extravagant claims in their direct testimony about the alleged underwriting discretion that agents and employees, as searchers and examiners, exercise in writing title reports or final policies. The cross-examination of these same witnesses clearly demonstrated, however, that legally enforceable easements, mortgages, restrictive covenants, liens, assessments, and encroachments must be shown on Schedule B of the title report, and that this so-called discretion is narrowly limited to not showing minor, insignificant, and technical title defects ("glitches," "fly specks" or "nits and bits") such as ancient and patently unenforceable mortgages, easements, liens, or covenants, which if not cleaned up would in effect give an inaccurate picture of the true state of title.[116]

[114] Anito 264-66; CX 156Z-45 to Z-46, CX 161Z-34, Z-342, Z-358, Z-382, CX 179L, CX 184A-G, CX 197C, CX 199A, CX 214, CX 215, CX 216, CX 219, CX 220, CX 222Q, Z-64, Z-99, CX 227Z-40, CX 230A, CX 232C, CX 237"O", CX 240, CX 241, CX 254Z-7, CX 320Z-159, CX 342F-M; RX 420.

[115] Anito 279-80. As a matter of form, the minor "glitches" that may be dropped entirely from the title report may be included in the attorney's opinion accompanied by an explanatory discussion. Anito 305-06, 315-316.

[116] Ippel 639-40, 649-51, 664-67, Malaker 732-34, 748, 793-800, Sinkhorn 867-74, 887, 906-14, Fromhold 965-71, 1005-10, Waiwood 1060-61, 1064-65, 1079-80, 1084-86, 1101-03, Armstrong 1141-42, 1167-68, 1171-72, Ferraro 1228-29, Bonita 1280-86, 1291, 1295-1300, 1302-03, Everbach 1320, 1354-55, 1393-96, Haines 3120-21, 3130-31, 3222, 3230-31, 3233-37, 3240-43, Bowling 3286-87, 3294-95, 3339-44. See also CX 91Z-38, CX 161Z-36, CX 196Z-16, Z-139, CX 237N-"O", CX 342"T"-M; RX 420-RX 420A.

78. That the discretion given to searchers and examiners is severely limited to title objections which are insignificant is demonstrated by the absence of credible evidence that respondent insurers have incurred any significant losses traceable to the exercise of discretion by searchers and examiners in eliminating minor title defects.[117]

79. Moreover, in sharp contrast to testimony from company officials and agents about searcher and examiner discretion, the insurer-agent agreements and company directives contain explicit requirements that the agent, without any discretion, must list all material title defects as exceptions on Schedule B of the title report.[118]

80. Similarly, when a title report is to be issued on the basis of an approved attorney's certification, the approved attorney is required to list all valid mortgages, judgments, liens, and other material title defects in his certification.[119] But the approved attorney, like the attorney-agent, does not include in his certification clearly technical and in material title defects.[120]

81. Independent abstractors, who may perform searches for title insurers or their agents prior to the issuance of a pre-policy report, typically note all pertinent defects, encumbrances, and liens. They usually have no discretion to omit any outstanding interest, no matter how insignificant it may appear.[121]

[117] See Anito 342, Sinkhorn 906, 911-12, Fromhold 1007, 1011, Armstrong 1174.

[118] Sinkhorn 922-23; CX 138B, CX 182G, CX 230A, CX 231A-B, CX 232C, CX 320Z-157.

[119] CX 160G-H, CX 196Z-11 to Z-12, CX 237Z-9 to Z-14; RX 410P.

[120] Sinkhorn 928, Haines 3235-36, Bowling 3361-63, 3379-80; CX 160H, CX 196Z-11 to Z-12.

[121] Cooper 365-67, 370-72, Everbach 1341; CX 253Z-5.

82. These restrictions on the discretion of agents, approved attorneys, and abstractors reflect not only respondents' own basic philosophy of avoiding risk, but also proceed from respondents' legal obligation to inform the prospective owner of all outstanding defects in title,[122] and the stringent disclosure requirements imposed by the federal guarantors—Government National Mortgage Association (GNMA) and Federal National Mortgage Association (FNMA)—who dominate the secondary mortgage market.[123]

83. Once enforceable or even doubtful title exceptions appear on Schedule B of the title report of the agent (or in the certifications of the approved attorney or abstractor) they are subject to strict legal review at the regional, divisional, or corporate level of respondents before being considered for either affirmative coverage or elimination from the final policy.[124]

84. In practice, a decision is rarely made at any level of respondent insurers by which affirmative coverage is extended over a significant disclosed defect, and the common rule in the title insurance industry is that enforceable title defects appearing on Schedule B of the title report will inevitably appear as specific exceptions on Schedule B of the final policy unless the insured takes corrective steps (for example, payment of mortgage money or posting of

[122] Ippel 663, Malaker 756-57, Waiwood 1103, Wilkie 2109-10, Bowling 3339-40; CX 183, CX 184A-G, CX 192, CX 198B, CX 221, CX 222Z-64, CX 251A-B, CX 320Z-157 to Z-158.

[123] Malaker 808, Bonita 1300-01, Everbach 1398, Haines 3231, Bowling 3342-44; CX 155F, CX 193A-E, CX 253Z-31 to Z-32, CX 303A-B, CX 320Z-159.

[124] Bowling 3278-79, 3294-95; CX 145B, CX 146B, CX 218, CX 220, CX 221, CX 222Q, Z-25, CX 223B; RX 387, RX 396H, RX 410D, Z, Z-2, RX 413M.

bonds to satisfy existing tax or judgment liens) to cure them.[125]

The Title Insurance Policy

85. The formal title policy continues the process begun in the preparation of the title report of identifying risks which are not to be insured. Thus the face page of the standard-form owner's policy (ALTA Form B-1970), which is used throughout the title insurance industry,[126] begins with the declaration that the policy does not cover the exclusions or the exceptions appearing on Schedule B of the policy. The standard terms are as follows:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, [X, Y, Z] TITLE INSURANCE COMPANY . . . herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:
>
> 1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;

[125] Anito 265-67, Cooper 372-73, Sinkhorn 887-88, Waiwood 1067, Armstrong 1172, Bonita 1302, Everbach 1396-97, Haines 3234-35; CX 30Z-67, CX 87K, CX 160H, CX 196Z-144, CX 237Z-8, CX 247F, J, CX 252S, CX 260G, CX 292G-H, CX 294C, CX 297, CX 322Z-117; RX 102Z-96, RX 413D, RX 482B, RX 488"T".

[126] Cooper 360, Bonita 1302; CX 171; RX 102Z-125, RX 428Z-136, RX 431Y.

2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land; or
4. Unmarketability of such title.[127]

86. The standard exclusions, cited on the face page of the policy, are designed to reduce insurer risk by use of the following language:

The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.
2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.

[127] RX 389Z-387. The face amount of the standard owner's policy is the purchase price. Anito 273; CX 247V. The standard mortgagee's policy, which covers the face amount of the loan, has similar coverage except for the addition of provisions insuring the priority of the mortgagee's lien. The mortgagee's policy also has provisions which are similar to the standard exclusion as well as the standard exceptions appearing in Schedule B of the owner's policy. Ippel 626, Haines 3179-80, Bowling 3272; CX 182J-L, Z-90 to Z-95; RX 389Z-408, RX 405Z-172. Owner's and lender's policies may be combined in one simultaneous policy. CX 182L, Z-96.

3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.[128]

87. Schedule B of the standard ALTA policy then lists five general exceptions—

(1) Rights or claims of parties in possession not shown by the public records.

(2) Encroachments, overlaps, boundary line disputes, and any matters which would be disclosed by an accurate survey and inspection of the premises.

(3) Easements or claims of easements not shown by the public records.

(4) Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

(5) Taxes or special assessments which are not shown as existing liens by the public records.[129]

[128] RX 389Z-392.

[129] RX 389Z-397.

88. Some of the five "off-record" general exceptions (on either the final policy or the earlier report) may be removed, without creating significant risk to the insurer, by various off-record procedures such as a survey of the property, or by obtaining an indemnity, waiver, release, or proof of payment of taxes.[130] The removal also requires the purchase of an extended coverage policy.[131] Moreover, if the off-record inquiry discloses any significant title defect, that defect, too, will inevitably appear in the special exception portion of Schedule B.[132]

89. What are not eliminated from Schedule B of the policy are the special exceptions representing the enforceable easements, restrictive covenants, use restrictions, and liens which first appeared on Schedule B of the title report (see Finding 76) and which were not subsequently removed by the insured. As a matter of strict rule, respondent insurers require that company agents and employees must show all enforceable title defects on Schedule B of the policy as special exceptions to coverage.[133]

Risk Assumption By Title Insurers

90. As indicated in Finding 84, significant defects to title uncovered during the search and examination process are usually either cured by the insured or excepted from coverage since the basic approach of respondent title insurers is to avoid risks and not to insure suspect titles.

[130] Anito 276, Haines 3202-17; CX 182J, L, CX 222Z-47, Z-54 to Z-61, CX 247J, CX 248N-"O", CX 295E; RX 480-RX 480A.

[131] CX 247J, CX 298B, CX 302B; RX 15A-B, RX 417Z-36 to Z-37.

[132] CX 242B, CX 248N, CX 295E; RX 428Z-338.

[133] Armstrong 1171-72, Bonita 1302; CX 161Z-342, Z-382, CX 184A-G, CX 214, CX 216, CX 219, CX 220, CX 221, CX 240, CX 241, CX 247J, CX 254Z-7, CX 292Q-R.

91. Thus, like abstractors and independent attorneys, the most significant risk that title insurers face is whatever peril attaches to conducting a competent search and examination of the public records.[134]

92. The risk to insurers from negligence in the title search and examination process is reduced, however, by the contractual relationship between insurers and abstractors, independent attorneys, approved attorneys, and agents which expressly provides for negligence liability in conducting the search and examination.[135] In addition, agents are commonly required to carry errors and omissions insurance,[136] and approved attorneys are usually required to have professional liability coverage.[137]

93. The risk from hidden title defects—forgery (the main danger), false impersonation, or the execution of documents by minors—which cannot be addressed by the search and examination process, represents a relatively minor portion of the already small number of claims paid by title insurers.[138]

94. In a rare number of instances, if an uncovered title defect is not cured, and if the risk is both calculable and low (and assuming further that indemnities or extra premiums have been received from the insured), respondent insurers may make a decision to give affirmative coverage by insuring "over" a known title defect appearing

[134] Anito 277-78, Quadraccia 505, Sinkhorn 919, Haines 3166-68; CX 156Z-4, CX 172J, CX 181G-H, CX 222Z-11, CX 300A, CX 309Y; RX 397, RX 442A-B.

[135] CX 138C, CX 140B, CX 145C, CX 146D, CX 160G, CX 228C, CX 230B, CX 231C, CX 261"T"-K; RX 410J. See also CX 186A-B, CX 187A-B, CX 309P, and RX 390A for references to the common law negligence liability of abstractors and agents for errors and omissions in preparing abstracts and reports for title insurers.

[136] Ferraro 1237; CX 138C, CX 145B, CX 146D, CX 180Z-62, CX 231B, CX 232E.

[137] CX 230C; RX 410L, RX 413J-K, RX 444N.

[138] CX 30Z-67 to Z-69, CX 196Z-121 to Z-122; see also Finding 99.

in Schedule B of the title report or the policy.[139] Considering the severely restrictive conditions under which affirmative coverage is given, it naturally follows that losses due to such coverage are rare.[140]

95. For the most part, agents and branch employees of respondent title insurers are prohibited from giving affirmative coverage for a known risk without the prior approval of respondents' supervisory regional, divisional, or home office underwriting staffs.[141] There is no evidence that any title insurer has incurred any loss by reason of an agent's decision to insure over a known title defect without obtaining such prior approval.[142]

96. Significant title defects are insured over (in those rare instances when it is done) on the basis of case-by-case legal analysis by respondents' underwriting staffs located in divisional or regional offices, and in the case of substantial risk by "risk committees" located in the home offices.[143]

[139] CX 87K, CX 155C, CX 181H, CX 182M, CX 196Z-139 to Z-140, CX 294D, CX 297, CX 322Z-117; RX 413T, RX 443M, RX 444Y. Even when a title insurer insures "over" a known defect, the common practice is still to list the defect on Schedule B, and then issue affirmative coverage as a way of limiting the insurer's liability for unmarketability of title. Armstrong 1173, Everbach 1344-45, Bowling 3273, 3299, 3344-45.

[140] Sinkhorn 919-20, Armstrong 1174.

[141] Malaker 777, Fromhold 946-47, 949-50, 1010, Bonita 1302-03, CX 145B, CX 146B, CX 160H, CX 161Z-43, Z-136 to Z-138, Z-153 to Z-154, CX 179L, CX 182M, CX 202L, CX 218, CX 220, CX 222S, Z-11 to Z-12, Z-18, Z-25, Z-65, Z-217 to Z-218, CX 223B, CX 230A, CX 237Z-8 to Z-9, CX 322Z-117, CX 342N-"O", Q; RX 387, RX 410Z to Z-4, RX 413M, T, RX 444Y. The exceptions to this general rule relate to a limited set of circumstances tightly controlled by the insurance companies such as matters with an established expiration date, claims that can be satisfied by the payment of a sum of money, legally unenforceable restrictive convenants, and minor discrepancies in set-back lines. CX 161Z-137 to Z-138, CX 222Z-65, Z-214 to Z-219, CX 237Z-8 to Z-9.

[142] See Fromhold 1011.

[143] Bowling 3266-67, 3278-79, 3281, 3295-96; CX 160H, CX 182M, CX 218, CX 237Z-8 to Z-9, CX 322Z-117; RX 464E-F, RX 482B-C.

97. Another factor taken into account by a title insurer in deciding whether to give affirmative coverage is competitive pressure from other title insurers.[144]

93. There is no evidence that in those rare instances when uncovered risks are insured over, this somehow involves a pooling of the risk experience of a group of insurers, or even represents an actuarial assessment of risk by an individual insurer.[145]

Claim Payments

99. That all risks assumed by respondent title insurers—whether from a negligent search and examination, or from hidden defects, or from insuring over uncovered defects—are minuscule is shown by the history of claim payments. Only about five to ten percent of a title insurer's gross premium income is used to pay actual losses while over 90 percent is absorbed by operating expenses, mainly the cost of searching and examining title.[146] In contrast, the average loss ratio for homeowner's multiple peril insurance is approximately 65 percent, and the ratio for the other lines of casualty insurance is still higher.[147]

100. The one-time premium, which is based on the purchase price of the property or the amount of the mortgage, further distinguishes title from true risk insurance.[148] Thus in contrast to title insurance, casualty

[144] Waiwood 1058, 1080, 1086, 1125, Armstrong 1159-60, Bonita 1294-95, Bowling 3277-79; CX 189Z-17, CX 237Z-6 to Z-7; RX 482B-C, RX 483C, RX 484-484B.

[145] See Holtom 1505-06 and Finding 114.

[146] CX 30Z-67 to Z-68, CX 91Z-84 to Z-85, CX 116D, CX 156Z-3 to Z-4, CX 166Y-X, CX 262R; RX 92Y, RX 102Z-95 to Z-98, RX 364C. See also Anito 277-78, Armstrong 1181, Bethel 1952-53.

[147] Bethel 1994-95; CX 91Z-84, CX 116D.

[148] CX 156Z-3, CX 260H. The one-time premium is the only charge for title insurance so long as the named insured retains an interest in the property. CX 182E.

insurance involves variable annual premiums that assumes a yearly review followed by a decision as to whether or not coverage is to be renewed or amended depending on risk assessment.[149]

101. The difference between title insurance and casualty insurance is also shown by the restrictions in most states preventing title insurers from engaging in any form of casualty insurance for the very reason that these states did not want title insurers to assume risks.[150]

G. TITLE INSURANCE RATES

102. Respondents and state insurance departments recognize that there is a sharp distinction between the two things that title insurance companies do—that is, first, provide a service by informing buyers and lenders of the existence of title defects, and second, indemnify buyers and lenders for the small volume of claims that are paid either because of insuring over risks, or hidden risks, or errors in the search.[151]

103. In the context of rate making, this two-faceted nature of their operations is reflected in the fact that respondents' rate manuals often separate out a small charge for indemnification (what is euphemistically called the "risk" rate for whatever risks are assumed) from a large charge for conducting a search and examination.[152] The "risk" rate is not challenged in this proceeding (except

[149] CX 253Z-10, CX 260H.

[150] CX 260D; RX 102Z-99.

[151] Wirtz 1808-09, Haines 3224-25, Fraundorf 3442-43; JXA, p. 89; CX 56B-D, CX 91Z-35, Z-38 to Z-39, CX 130G, CX 131B, CX 133F, CX 156Z-3 to Z-4, CX 208A-C, CX 261"T"-K, CX 293D; RX 167C-D.

[152] Everbach 1377; CX 110B, E, CX 130A to Z-2, CX 132F, CX 155C, CX 222Z-75, CX 237Y to Z-1, CX 273C, CX 311G; RX 3E.

for Ohio, see Findings 158-61), which essentially involves those few states which have required title insurers to file risk as well as search and examination rates, and have allowed both rates to be set by rating bureaus.

104. Prior to October 1983, Connecticut had both an "Approved Attorney Plan" as well as the much larger "All-Inclusive Rate Plan" that included fees for search and examination performed by agents or employees.[153] The Approved Attorney Rate (in the special jargon of the title insurance industry) only covered the risk portion of the premium, the assumption being that approved attorneys would charge an additional and unregulated fee for search and examination.[154] Since October 1983, however, Connecticut has only had a risk rate. The change was intended to reflect the prevalence of the approved attorney system in Connecticut and the redundancy of an all-inclusive rate.[155]

105. Pennsylvania, too, has an "approved attorney" rate representing the risk portion only of the total premium (the assumption again being that the approved attorney will bill the consumer separately for an unregulated search and examination fee) as well as an inclusive rate, embracing risk as well as charges for search and examination. The inclusive rate applies when the services are performed by insurance company employees or agents.[156]

[153] CX 25B, CX 29B-C, CX 30Z-84 to Z-86, CX 35A-D; RX 101A, RX 102"O"-P.

[154] DiSanto 2753-55. While putatively unregulated, in practice approved attorneys' charges for search and examination reflect the difference between the inclusive rate and the Approved Attorney Rate. DiSanto 2754.

[155] DiSanto 2749-50; CX 32A-X; RX 103A-B.

[156] CX 130A-CX 136D, CX 145E; RX 35J.

106. Until September, 1983, New Jersey had separate rate schedules for risk and search and examination.[157] The risk rate, as in Connecticut and Pennsylvania, was designated as the "Approved Attorney Rates" and covered "title insurance underwriting only."[158] Since September, 1983, New Jersey has only published an inclusive rate that simply combines the risk rate with the search and examination charge.[159]

107. Montana has an inclusive rate, combining a discrete small charge for risk (designated as the "title insurance premium" and constituting 20% of the rate) and a much larger charge (representing 80% of the total filed rate) for search and examination.[160]

108. Idaho has an inclusive rate which combines a risk charge and a fee for performing the search and examination service. The rates are described as "the total title insurance fees charged the applicant including both the risk portion and the service or work portion. . . ."[161]

109. Arizona has an inclusive rate. It combines the "portion of the fee . . . for the assumption by the title insurer of risk" as well as search and examination fees.[162]

110. Ohio has a "risk" rate, which applies only to risk assumption or underwriting expense, and does "not include costs involved in the production of title evidence."[163]

---

[157] CX 276A-CX 283Z-15; RX 3 to RX 3Z-54.

[158] RX 3E, "T".

[159] CX 284A-CX 285W; RX 30-RX 30C.

[160] CX 41K.

[161] CX 56Q.

[162] JXA, p. 89; CX 9a to Z-52.

[163] RX 290. See also RX 289 for statement by the Ohio Department of Insurance that Ohio rates do not include a "work charge."

111. Prior to 1984, Wisconsin had a so-called "original" rate, which was simply the addition of two discrete components—a small "risk fee" and a much larger search and examination charge.[164] While the "original" rate has been published since 1984 without the two components, it clearly represents the simple addition of a risk fee and a search and examination charge.[165]

Title Insurance Rating Bureaus

112. Title insurance rating bureaus are private organizations organized by respondents and other title insurers doing business in a particular state for the purpose of establishing uniform rates for their members.[166] Uniform rates are established by rating bureaus notwithstanding differences in efficiencies among the members, especially differences in the cost of conducting search and examination.[167]

113. Where a title insurance rating bureau establishes either an inclusive rate or a separate rate schedule for search and examination, the rate making function of the bureau is usually supported by profitability studies furnished by retained experts. These studies dwell mainly on the cost of carrying out the search and examination, including the fixed costs of title plants, which must be maintained irrespective of fluctuations in the real estate market.[168]

---

[164] CX 114K, CX 124J.

[165] Wirtz 1794, 1808-09; CX 127J.

[166] DiSanto 2727; CX 171, p. 58, CX 222Z-76.

[167] RX 325.

[168] Plotkin 2457-66; CX 30A to 30Z-98, CX 56A to 56Z-15, CX 208A-C; RX 39 to 39Z-16, RX 91 to 91Z-80, RX 102 to RX 102Z-126, RX 167-RX 167X, RX 364 to RX 364Z-7. Fluctuations in the real estate market are responsible for the cyclical nature of title insurer earnings. Bethel 1969-70; CX 91Z-92 to Z-93; RX 3U-V, RX 102J-K.

114. There is no evidence that title insurance rates are set collectively through rating bureaus as a way of obtaining intra-industry cooperation in the pooling of risk information. As a matter of fact, there is no evidence that any title insurer, whether operating through a rating bureau or otherwise, sets rates by referring to actuarially determined loss experience.[169] As the New Jersey Title Insurance Rating Bureau put it:

> . . . it is not possible to set up an actuarial standard for risk assumption based on loss experience. Risks in the title insurance industry are of too low an incidence and too random a character to justify this type of rate determination.[170]

115. There is also no evidence that title insurance rating bureaus are necessary in order for respondents to operate as profitable and reliable insurers.[171] Nor is there any evidence that rating bureaus are necessary in order for the states to regulate title insurers effectively.[172]

H. STATE AUTHORIZATION AND ACTIVE SUPERVISION OF TITLE INSURANCE RATING BUREAUS

Authorization

116. Complaint counsel concede that the joint rate making activity by rating bureaus in six of the eight states remaining in this proceeding was authorized by state law. The issue of state authorization only arises with respect to rating bureau activity in Pennsylvania and New Jersey, and pertains only to fees charged by attorney-agents (see Findings 117-123).

---

[169] See Wirtz 1790-91; CX 56B-D, CX 82E, CX 91G, CX 156Z-3 to Z-4; RX 39B, RX 102Z-15, RX 167C-D, RX 241-241A.

[170] RX 3Z-4.

[171] See Everbach 1410-11, Wilkie 2130-31, Bowling 3357-58.

[172] See Wirtz 1769.

Pennsylvania

117. Complaint counsel's case with respect to the authorization issue in Pennsylvania rests solely on Section 701(5) of the Pennsylvania Insurance Company Law, which broadly provides that fees for title insurance are subject to regulation but contains the following proviso:

> "Fee" for title insurance means and includes the premium, the examination and settlement or closing fees, and every other charge, whether denominated premium or otherwise, made by a title insurance company, agent of a title insurance company or an approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for any policy or contract for the issuance of, or an application for any class or kind of, title insurance; but the term "fee" shall not include any charges paid by an insured or by an applicant for insurance, for any policy or contract, to an attorney at law acting as an independent contractor, and retained by such attorney at law, whether or not he is acting as an agent of or an approved attorney of a title insurance company, or any charges made for special services not constituting title insurance, even though performed in connection with a title insurance policy or contract.[173]

118. There is no dispute that when a Pennsylvania attorney-agent, in connection with the issuance of a title policy, receives a premium from a client, a part of that premium is retained by the attorney-agent as his fee for conducting the search and examination.[174] The record

---

[173] JXA, p. 45.

[174] CX 138E, CX 140C, CX 143A-C, CX 145A-E, CX 146A-F.

also shows that the total premium including the portion retained by the attorney-agent was fixed by the Pennsylvania Title Insurance Rating Bureau when it set an inclusive rate.[175] Complaint counsel argue, however, that since Section 701 excludes "any charges paid by an insured . . . to an attorney at law acting as an independent contractor and retained by such attorney at law" the Pennsylvania Rating Bureau had no statutory authority to set an inclusive rate embracing the search and examination charges of an attorney-agent.

119. The Pennsylvania Insurance Department has filed a brief (Amicus Curiae Brief of The Commonwealth of Pennsylvania Insurance Department, March 3, 1986) in which it argues for an interpretation of Section 701 that would make inclusive insurance rates applicable to attorney-agents. In support of this position, Pensylvania essentially makes three points. First, the interpretation urged by complaint counsel is contrary to the actual practice of the Pennsylvania Insurance Department.[176] Second, complaint counsel's interpretation would leave an unintended void in state regulation based upon the totally irrelevant factor of professional affiliation, and thus is contrary to the Pennsylvania practice of narrowly interpreting legislation that might create such a void.[177] And finally, the intention of the state legislature was not to give a blanket exception but only to exclude from Section 701 those aspects of an attorney-agent's law practice that are unrelated to title insurance such as the issuance of an attorney's opinion (see Finding 46 for evidence that an attorney may function as an independent attorney issuing attorney's opinions as well as an attorney-agent or approved

[175] RX 38F.

[176] Amicus Brief, p. 13.

[177] Amicus Brief, pp. 15-16.

attorney) under the rationale that attorneys, *qua* attorneys, may only be regulated by the judicial branch of the Pennsylvania government.[178]

120. Complaint counsel concede that Pennsylvania actively supervises all aspects of title insurance, and the record shows that the state has a long history of aggressive regulation of title insurance.[179] Moreover, no evidence was presented that anyone in Pennsylvania—insurance regulators, consumers, bar, the real estate industry—have endorsed complaint counsel's reading of the statute.

121. Effective February 28, 1986, the Pennsylvania Title Insurance Rating Bureau surrendered its license to the insurance department.[180]

New Jersey

122. Complaint counsel argue that in New Jersey, as in Pennsylvania, there is no statutory authorization for the fixing by the New Jersey Land Title Insurance Rating Bureau of an inclusive rate applicable to searches and examinations carried out by attorney-agents. The relevant statute, *N.J. Stat. Ann.* 17:46B-1(f), which constitutes complaint counsel's entire case on this point, reads in pertinent part—

> "Fee" for title insurance means and includes the premium for the assumption of the insurance risk, charges for abstracting or searching, examination, determining insurability, and ever other charge, whether denominated premium or otherwise, made by any of them, but the term "fee" shall not include any charges paid to and retained by an attorney at law whether or not he is acting as an agent of a title insurance company or an approved attorney.[181]

[178] Amicus Brief, pp. 10-13.

[179] See, e.g., RX 35 to RX 35Z, RX 37 to RX 37"O", RX 43.

[180] Amicus Brief, p. 1, n.1.

[181] JXA, p. 3.

123. As in Pennsylvania, the history of title insurance rate regulation in New Jersey suggests that the state intended that inclusive rates should apply to attorney-agents,[182] and while the New Jersey statute is as ambiguous as Pennsylvania's, complaint counsel offered no testimony, documentary evidence, or legislative history supportive of its interpretation. The only light shed on the statute in this record is that the proviso probably represented a legislative concession to the organized bar's insistence that the state insurance department not infringe on any non-insurance aspect of an attorney's practice.[183]

Active State Supervision

124. New Jersey and Pennsylvania aside,[184] the state action issue in the six states remaining in this proceeding—

[182] During the course of the insurance department's review of rating bureau submissions, no question was ever raised about inclusion of attorney-agents in the inclusive fee schedule. Clayton 1833-35, 1845-47, 1852, 1860. Moreover, despite New Jersey's long history of vigorous opposition to title insurer rate increases and practices from a coalition of real estate attorneys, bankers, builders, and notwithstanding the presence in New Jersey of an insurance ombudsman or public advocate, no one has ever suggested that attorney-agents should be excluded from rate regulation by reason of the interpretation of the statute advanced by complaint counsel. See Clayton 1850-51, 1860-63; CX 276A-R.

[183] See Clayton 1832-33, 1837-42.

[184] On the question of state supervision in New Jersey and Pennsylvania, complaint counsel have entered into the following stipulation:

> For purposes of this litigation, complaint counsel will not contest the issue of the level of state supervision under the state action doctrine in New Jersey and Pennsylvania. Complaint counsel has not conducted a detailed factual analysis of the level of state supervision in these states but, solely for purposes of expediting this litigation, agree with respondents to stipulate that there has been active state supervision in New Jersey and Pennsylvania sufficient to satisfy the second prong of the state action doctrine as set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 102 (1980). RX 43-RX 43A (Stipulation dated 11-25-85).

Connecticut, Wisconsin, Arizona, Ohio, Idaho, and Montana—turns on whether the joint rate making with respect to title insurance in general, and search and examination in particular, is actively supervised by these states. This determination, which must be made on a state-by-state basis, requires an examination of each state's basic regulatory scheme for title insurance, and how that regulatory scheme responded to readily identifiable areas of concern in the rate making process (see Findings 125-179).[185]

Connecticut

125. The Connecticut title insurance rating bureau (the Connecticut Board of Title Underwriters, hereinafter the "Connecticut Rating Bureau") was authorized to establish joint rates for its members after receiving a license from the state's insurance commissioner in 1965.[186]

126. The Connecticut Rating Bureau was subject to a wide array of latent powers possessed by the insurance

[185] The fact that state regulators participate in the proceedings of the National Association of Insurance Commissions (NAIC), including the drafting of a Model Title Insurance Act, tells us nothing about how actively these state regulators actually supervise in their own states. In short, while *enactment* of the NAIC Model Title Insurance Act may be indicative of a state's determination to supervise certain insurer practices (see note 269, *infra*), there is no convincing evidence that NAIC proceedings are a surrogate for supervision, nor is there any proof that NAIC mandated statistical reports are used or are useful for supervising insurers. See, e.g., Wilkie 2123-24, DiSanto 2795-96, Bowling 3358, Fraundorf 3445.

[186] DiSanto 2727-28; JX A, pp. 142-45; RX 102C.

commissioner including the authority to conduct audits, revoke the bureau's license, hold hearings respecting rates, and rescind previously filed rates.[187] In practice, however, the insurance department neither audited the bureau nor did it hold any hearings respecting a bureau rate filing.[188]

127. Since 1982 Connecticut has used a "file and use" approach, under which insurers, including insurers operating through rating bureaus, must file rates and wait 30 days before using them. If not disapproved by the insurance commissioner during the 30 days, the rates are "deemed" approved under a "deemer" provision. Prior to 1982, Connecticut allowed rates to be used as soon as they were filed.[189]

128. The basic policy of Connecticut is that there should be minimum state involvement in regulation of title insurance rates, the assumption being that rates should be set by the competitive market.[190]

129. Notwithstanding its policy of encouraging competition, Connecticut authorized joint title insurance rate making by the Connecticut Rating Bureau on the further assumption that the bureau's non-competitive rate making process would be scrutinized under the state's general statutory standard of review, i.e., that the rates should not be excessive, inadequate, or unfairly discriminatory.[191]

[187] JX A, pp. 145-58.

[188] Ferraro 2341, DiSanto 2777-78, 2793. Connecticut law does not require that insurance rate filings be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with respect to each rate filing. State insurance regulators are opposed to any such strict procedural requirements on the grounds of cost, and the inevitable delay that such procedures would entail. DiSanto 2769-70, Bell 2841-42.

[189] DiSanto 2813-18; JXA, p. 156.

[190] JXA, pp. 159-60.

[191] DiSanto 2818; JXA, pp. 141, 156. See also CX 293C.

130. The Connecticut Rating Bureau filed only two major rate increases with the Connecticut Insurance Department – in 1966 and on December 3, 1981.[192] With the passage of time, the facts relating to the 1966 filing are elusive,[193] but it is apparent that the main concern of the insurance department centered on whether the 1966 rate should be for "risk" only or should also include search and examination. On April 3, 1966, the department wrote to the bureau –

> We feel that the filing should include insurance rates only and not the fees for the cost of examination of title. We need justification for such rates as well as the breakdown of the premium dollar. How will statistics be kept for this line of insurance? Will reserves be at least equal to those required under the New York law? What states have approved similar filings and what rates became effective?[194]

After an exchange of correspondence on the point, the insurance department approved the bureau's rate, effective August 15, 1966,[195] although there is no evidence that the department's request for justification relating to this rate was ever answered satisfactorily.[196] As approved, the 1966

[192] Amendments and endorsements, including rate increases and rate reductions, were filed throughout the period 1966 to 1983. CX 26A-CX 28C, CX 33A-CX 34G; RX 148, RX 152-RX 152A, RX 153-RX 153A, RX 154-RX 154B, RX 155F, RX 160-RX 164E. Apparently some were carefully reviewed while others were approved with minimal review; there was no showing, however, in the record that even this minimal review was inadequate considering the subject matter of these minor ancillary filings. See Ferraro 2324-25, DiSanto 2757-69, 2772, 2779-80, 2786-87, Bell 2835-39, 2844-45.

[193] See DiSanto 2729; CX 25A-H; RX 104-RX 111C.

[194] RX 104.

[195] RX 105-RX 111C.

[196] See Ferraro 2334-35; RX 105-RX 111C.

schedule contained both a risk rate (i.e., the so-called "Approved Attorney Plan") and an all-inclusive rate setting the charges for risk as well as search and examination.[197]

131. The only other major rate filing of the Connecticut Rating Bureau was made on December 3, 1981. It contained a 20 percent increase in both the approved attorney (risk) rate, as well as the inclusive rate covering risk charges and search and examination fees.[198]

132. In support of the 1981 rate increase, the Connecticut Rating Bureau submitted a profitability analysis by Arthur D. Little showing that on the basis of statistical reports received from the members the proposed increase would produce a projected 2.78 percent return on capital.[199] While Dr. Plotkin of Arthur D. Little defended the use of profitability data in connection with the rate submissions of the Connecticut Rating Bureau and other bureaus, he acknowledged that these reports were not intended for the purpose of ascertaining the reasonableness or propriety of insurer expenses.[200] He further conceded that a test of state supervision is whether the state examines the extent to which unreasonable insurer expenses are contributing to the burden borne by the insurance buying public.[201] In Plotkin's view, one expense in particular—excessive commissions paid to agents (i.e., "agents'

[197] CX 25A-H.

[198] DiSanto 2736, Bell 2826; CX 30A to Z-98. On September 30, 1983, the Connecticut Rating Bureau filed an amended manual eliminating the inclusive rate entirely, and in addition making minor adjustments in rates (see Finding 104 and DiSanto 2748-49, Bell 2834; CX 32A-X).

[199] CX 30A to Z-98; RX 102 to Z-126.

[200] Plotkin 2650-51, 2704-09.

[201] Plotkin 2650-51, 2683-84, 2698-99, 2707-09. See also Ferraro 2355-56.

retention," see Finding 44)—tends to drive up the cost of title insurance while dangerously shrinking insurance company profits.[202]

133. In order to show that the December 1981 increase (and its accompanying justification) were carefully reviewed by the Connecticut Insurance Department, respondents called Waldo R. DiSanto, Chief of the department's Property and Casualty Division. DiSanto testified that his discussions with the Connecticut Rating Bureau

> . . . centered around the expense component in the rates, more specifically the, in my terms, the disproportionate allowance for commissions paid in connection with title insurance.[203]

DiSanto further testified that in his view the agent's commission component of title insurer expenses was "very high,"[204] that it was the main problem area in title insurance,[205] and that it was driving the cost of title insurance up.[206] But having identified this crucial aspect of rate making, DiSanto immediately conceded that he was powerless to do anything about it. He testified as follows:

> Q. Did you address with the people with whom you met at this time possible methods of trying to control what you perceived to be these excessive commissions?
>
> A. Yes, commissions, in my view, commissions in the title insurance system have kind of became a sour point, if I can describe it that way, and it has been

[202] Plotkin 2684, 2706-09.

[203] DiSanto 2737. See also DiSanto 2756; RX 114-114A.

[204] DiSanto 2738.

[205] DiSanto 2797.

[206] DiSanto 2738.

kind of a constant item for discussion when I meet with or when I had met with title insurance people, the rating organization member representatives.

And I had discussed alternative ideas to reflect or to limit a more appropriate, in my view more appropriate, commission expense.

Q. Were you ever successful in trying to achieve this goal?

A. I guess not because the commissions are still about where they were.

Q. Is there any reason why you have not been able at this point to address this problem?

A. Yes. The function of the Insurance Department, the Insurance Commissioners Office, in connection with the review of rates is to require that the components in the rate making structure submitted by either an insurance company or by a rating organization on behalf of companies is, in fact, valid and supported and accurate.

However, our statutes do not provide the authority of the Insurance Commissioner to establish the amount or a minimum or maximum expense. It is only that if in the filing the companies or bureaus say the commission or company expenses or taxes are percent A, B and C, that they must specifically support that and they must be accurate, but the Commission does not have the authority to say it must be limited to a certain amount.

Now, in the commission area the discussions and the alternative suggestions, in my view, would have required statutory changes, which is not within the function of the Insurance Department or my division. We can suggest, well, that is all we could do.

So that was one of the alternatives of me doing it from that standpoint.

In balance, the commissions in those days are pretty much still in effect. So I guess we have not been successful in changing them.

Q. And just to follow up on that, is this a matter that you have made an effort to address in the course of your regulatory scrutiny of the title insurance industry?

A. Yes, sir.[207]

And at Tr. 2809, DiSanto added—

JUDGE NEEDELMAN: Tell me whether this is a fair conclusion or not. You have recognized the importance in rate making of the commission paid by the insurer to the agent, correct?

THE WITNESS: Yes.

JUDGE NEEDELMAN: But Connecticut in no way regulates the commission arrangement between the insurer and the agent?

THE WITNESS: That is correct. It is my understanding, with the exception of a few states that have different arrangements, that this commission is not dissimilar from that paid in other states.

In fact, I believe in some states it may be higher.[208]

134. DiSanto approved the December 1981 filing on January 15, 1982.[209]

135. By the beginning of 1985, all respondents were no longer active in the Connecticut Rating Bureau.[210]

---

[207] DiSanto 2738-41.

[208] DiSanto 2809. See also DiSanto 2793, 2802-03; CX 156Z-7.

[209] RX 113.

[210] Ferraro 2301, DiSanto 2727-28.

Wisconsin

136. The Wisconsin title insurance rating bureau (The Wisconsin Title Insurance Rate Service Organization, hereinafter "Wisconsin Rating Bureau"), was authorized under the state's insurance law to establish a joint rate schedule for its members after receiving a license from the Commissioner of Insurance in 1969.[211]

137. The Wisconsin Rating Bureau was subject to a wide array of latent powers possessed by the insurance commissioner, but there is little evidence that these powers were used to influence bureau rate making. To illustrate, while the insurance commissioner was required to examine the Wisconsin Rating Bureau at regular intervals, no examination was ever made. Similarly, while the Wisconsin insurance statute gives the commissioner the authority to reject rates established by the bureau through a process of hearings, no hearing has ever been held in Wisconsin on *any* insurance rate filing, and no rate suspension order has ever been issued.[212]

---

[211] Donohoe 1614; JXA, pp. 243, 253, 257-59; CX 107; RX 293-RX 295.

[212] Donohoe 1652-53, 1666; Wirtz 1779, 1784-85; JXA, pp. 254, 275-76, 279-80, 296-97. Hearings are only required if a rate is disapproved. JXA, p. 254. The burden of proof in such a hearing is on the insurance commissioner, and considering the limited resources of the insurance department, it is doubtful that he could prevail. According to an official of the state insurance department "[t]he statute was set up, the staffers in the office believe, this way to keep the commissioner and the department from interfering with the rate setting mechanism except in very unusual situations."-Wirtz 1786. There is no requirement under Wisconsin law that each insurance rate filing be subject to public notice, comment, and hearing, or that a written decision, appealable to the state courts, be issued with respect to each rate filing.

138. Rate filings by the Wisconsin Rating Bureau were made under a "use and file" system. This system allows rates to become effective on a date determined by the insurers so long as the rates and any supporting data were filed with the insurance commissioner and made public within 30 days after the effective date. In actual practice, however, the members of the Wisconsin Rating Bureau filed their rate manuals in advance of the effective date, and did not implement major new rate changes until after they were formally stamped as approved by the commissioner's office.[213]

139. The "use and file" approach of Wisconsin reflects a state policy of not interfering with private rate setting on the assumption that market competition would largely determine rates.[214]

140. By authorizing rating bureaus, however, Wisconsin further assumes that since there has been a departure from its basic policy of relying on competition amongst insurers, the rate making process will be closely reviewed.[215]

141. The standard for review of title insurance rates in Wisconsin is that rates should not be excessive, inadequate, or unfairly discriminatory.[216]

142. The Wisconsin Rating Bureau made major rate filings in 1971, 1981, and 1982.[217] In response to the 1971

---

[213] Donohoe 1621-22, 1652, Wirtz 1749-50; JXA, p. 251; RX 301.

[214] Donohoe 1666, Wirtz 1785-86, 1805-06.

[215] Wirtz 1806-08. See also CX 293C and JXA, p. 243 (i.e., it is Wisconsin policy "to regulate such cooperation in order to prevent practices that tend to bring about monopoly or to lessen or destroy competition").

[216] JXA, p. 246.

[217] In addition, throughout the period 1971-1984, amendments, forms, revisions, compilations, and endorsements were filed by the Wisconsin Rating Bureau. CX 111A to CX 114Z-25, CX 120A-

filing, the Office of the Commissioner raised some questions about the bureau's reasons for limiting search and examination charges to the southeastern counties of the state only. The issue was eventually resolved by the publication of state-wide search and examination charges. The 1971 rates, which represented historical rates charged before the formation of the bureau were, approved although supporting justification was not provided until 1978.[218]

143. Between the 1971 and the 1981 filing (and continuing to 1984), the Wisconsin Rating Bureau retained Arthur D. Little to draw up a statistical reporting system and income and expense plans to be used in justification of rates. The use of these plans is contemplated by the Wisconsin insurance statute which requires the Commissioner to promulgate reasonable rules for reporting loss and expense experience and authorizes the use of a rating bureau to assist the Commissioner in compiling these data.[219] The

CX 121D, CX 125A-CX 126E; RX 312-RX 315, RX 342-RX 344S, RX 356-RX 356A, RX 359-RX 359B, RX 363-RX 363C, RX 372, RX 373-RX 373D, RX 380-RX 380C, RX 384. The rate adjustments accompanying these filings were neither supported by justifications nor for the most part were they closely reviewed; in fact, the insurance department believed that the rating bureau may have pulled the rates "out of the air." Wirtz 1793. See also Donohoe 1661, Wirtz 1759-62, 1768-69, 1771-76, 1802-03, 1807-08.

[218] Donohoe 1618-27, 1657-59, Wirtz 1764, 1796, 1810-11; CX 110A-G; RX 348 to 348Z-81. The original geographical limitation reflected the fact that branches of the title insurers were concentrated in the Milwaukee area. In the remainder of the state, approved attorneys (whose search and examination charges were not regulated) were the predominant providers of search and examination services. See CX 262"T".

[219] Donohoe 1627-33, Grabski 1689-90, Wirtz 1763-65, Plotkin 2574-98; JXA, p. 260; RX 334 to RX 334Z-19, RX 348 to RX 348Z-81, RX 351, RX 353 to RX 353Z-13, RX 355, RX 361 to RX

Arthur D. Little materials, however, were never intended to be used for determining the reasonableness or propriety of the insurers' reported expenses.[220]

144. The 1981 filing represented a substantial increase (11 percent) in title insurance rates including the rate for search and examination. While the filing and supporting Arthur D. Little data were checked for accuracy before the rate was allowed to go into effect (i.e., not disapproved), the Office of the Commissioner of Insurance made no inquiry into insurer expenses, notwithstanding recognition by the state office that title rates cannot be effectively regulated without such a scrutiny.[221] A key official of the state's Office of the Commissioner of Insurance testified as follows:

> Q. Now, the department didn't have any idea what an efficient company's expenses would be for search and examination services?
>
> A. No.
>
> Q. But it is your opinion that you would really have to study the search and examination expenses of the individual companies in order to effectively regulate the charges for search and examination expenses?
>
> A. Yes.[222]

361Z-12, RX 370 to RX 370Z-17, RX 375 to RX 375U, RX 383 to RX 383Z-21, RX 496 to RX 496Z-23, RX 498 to RX 498Z-32. Arthur D. Little also represented the Wisconsin Rating Bureau in successfully opposing statutory revisions requiring specific justification data for each rate change and setting maximum search and examination fees. Donohoe 1634-40, 1653, Plotkin 2585-87; RX 320-RX 326A.

[220] Plotkin 2650-51, 2704-07. See also RX 336A.

[221] Wirtz 1750-57, 1776-83.

[222] Wirtz 1778-79. See also Wirtz 1777-78, 1826. See also Plotkin 2577-78 for evidence that Wisconsin insurance officials have acknowledged that excessive insurer expenses is a major concern.

The same official made the following over-all assessment of title insurance supervision in Wisconsin—

Q. Now, for the most part, the people in the insurance department are not concerned with title insurance, is that right?

A. It was not a major line of insurance that we devoted a lot of staff discussion to.[223]

145. Another rate increase (again including the charge for search and examination) was filed by the Wisconsin Rating Bureau in October 1982. The Office of the Commissioner gave this filing a cursory reading to the point that the supporting materials (statistical data and a pro forma analysis) were not even checked for accuracy before the rate increase was accepted.[224]

146. The Wisconsin Rating Bureau was dissolved, effective December 31, 1984.[225]

Arizona

147. The Arizona title insurance rating bureau (Title Insurance Rating Bureau of Arizona, hereinafter "Arizona Rating Bureau") was authorized under the state's insurance statute to establish joint rates for its members after being licensed in 1968 by the director of the Department of Insurance.[226]

148. The Arizona Rating Bureau was subject to a wide range of latent powers possessed by the state's insurance director including the power to audit the bureau's records

[223] Wirtz 1782. See also Wirtz 1790-91.

[224] Wirtz 1775-76, 1816-17, 1823-24, Plotkin 2600-05; CX 123A to CX 124Z-25; RX 374-RX 378.

[225] RX 385.

[226] Wilkie 2107-08; JXA, pp. 87, 91-92, 94, 101-10; CX 2-CX 5"T"; RX 48-RX 50A.

and revoke its license, and broad authority to hold public hearings, promulgate rules, and issue orders discontinuing bureau practices found to be inconsistent with the insurance statute.[227] That actual use of these powers, however, is more hypothetical than real as shown by the fact that during the entire period 1968 to 1981 the insurance department conducted no examination of the Arizona Rating Bureau although there is a statutory requirement for such an examination at least once every five years.[228]

149. The rate filings of the Arizona Rating Bureau were made pursuant to the "file and use" approach. Under this approach, the rating bureau filed rates and its members waited 15 days before using them. If no action was taken by the director during the 15 day waiting period, the rates were deemed approved under a "deemer" provision. Notwithstanding the "file and use" system, in actual practice the Arizona Rating Bureau's rate submissions were not put into effect until actually stamped "approved" by the director.[229]

[227] JXA, pp. 93-110.

[228] Bethel 1992-93, Wilkie 2109; JXA, p. 109; RX 93A. No public hearing was ever held in Arizona on joint rates filed by the Arizona Rating Bureau.

[229] Wilkie 2108, Barberich 2228-30, 2265; JXA, p. 92. If a rate filing was disapproved, a hearing had to be held. JXA, p. 93. A hearing could also be held at the request of a third party who objected to a rate filing. In actual practice, however, no rate filing of the Arizona Rating Bureau was disapproved, and no hearings on title insurance rates filed by the Arizona Rating Bureau was ever held. Wilkie 2128-29. Hearings were held on allegations that insurers or their agents had given illegal inducements to realtors in order to obtain business. RX 45-RX 47H. There is no requirement under Arizona law that insurance rate filings must be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with respect to each rate filing.

150. The general statutory standard for rate scrutiny in Arizona is that rates should not be inadequate, excessive, or unfairly discriminatory.[230] In reviewing rates, the Department of Insurance is broadly directed to give due consideration to maintaining the stability of rate structures, assuring the financial solvency of title insurers during periods of economic depression, and attracting capital to the title insurance business.[231]

151. The Arizona insurance statute also mandates that rate filings should be accompanied by adequate justification, and the Director of the Insurance Department, with the assistance of the rating bureau, is required to promulgate rules relating to statistical plans for use by the rating bureau in reporting the expense experience of its members as justification for rate increases.[232]

152. Against the background of the statutory scheme outlined in Findings 147-151, and putting aside minor rate amendments, adjustments, and endorsements filed throughout the period 1968 to 1980,[233] the Arizona Rating

---

[230] JXA, p. 91. In addition, the Arizona code elaborates on this broad statutory standard by providing that due consideration should be given to rate stability, encouraging growth in assets of insurers during periods of high business activity, providing for financial insolvency in periods of depression, and the desirability of paying dividends to induce capital investment. JXA, p. 91.

[231] JXA, p. 91.

[232] JXA, pp. 92-94.

[233] CX 10A-CX 18"O". There is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject. See Wilkie 2118-20; Barberich 2230-31, 2264-66. A 1968 rating filing by the Arizona Rating Bureau, which remained the basic title insurance rates throughout the period 1968 to 1983, apparently represented the rates charged by some bureau members before the bureau was formed, but these rates had not been filed with the Depart-

Bureau seemed to spend most of its time between 1977 and 1983 responding to a change in the insurance law that added settlement or escrow rates to the title insurance schedule.[234] During this period, several rate consultants, including Arthur D. Little, put together financial reporting and statistical plans mainly intended to show that the bureau's collectively established escrow rates did not produce excess profits.[235] These efforts culminated in a September 18, 1980 submission from Arthur D. Little containing a detailed analysis of the economic performance of the title insurance industry from 1972 to 1979, and designed to show that title insurance and escrow rates were not excessive.[236] Following this submission, the Department of Insurance announced on November 3, 1980, that an investigation of the Arizona Rating Bureau would be conducted along the following lines:

1) An examination of the rate-making procedures and methodology used by the [Arizona Rating Bureau] with respect to the development of title insurance and escrow rates for use in Arizona;
2) a determination as to whether the title insurance and escrow rates as filed by [Arizona Rating Bureau] are reasonable and not excessive, inadequate or unfairly discriminatory;

---

ment of Insurance prior to 1968. Bethel 1968, 1971, Wilkie 2074-77, 2107, 2112-13, Barberich 2289; CX 8A to Z-12; RX 60A. While the 1968 rate filing brought an inquiry from the Department of Insurance as to how the "risk" component of the filed inclusive rate was derived (Wilkie 2080, 2087-88; RX 69A), there is no convincing evidence that the rate was either justified by the bureau or reviewed by the state. See Wilkie 2113-14, Barberich 2263-64, 2289; RX 60A.

[234] Wilkie 2091-96, 2121-23, Barberich 2243-44; RX 63-RX 63Z, RX 83-RX 83G.

[235] Wilkie 2092-99, 2121-26, Plotkin 2607-16; CX 9A to Z-52; RX 63-RX 63Z, RX 67-RX 67E, RX 91 to RX 92Z-16, RX 493 to RX 493Z-17.

[236] Plotkin 2617; RX 92 to Z-16.

3) An analysis of the methodology used for measuring the profitability of title insurers and their agencies, including an analysis of the Arthur D. Little statistical plan which has been filed on behalf of [Arizona Rating Bureau];
4) an evaluation of the extent to which there is competition among title insurers doing business in Arizona; and
5) the identification of areas which the rate-making methodology, including any statistical plan, together with the level of competitive activity among insurers might be improved.[237]

The Arizona Rating Bureau was also informed that—

> . . . the Department has not, as yet, approved the statistical plan prepared and filed on behalf of [Arizona Rating Bureau] by Arthur D. Little. Hopefully, this examination will provide the Department with the necessary evaluation of this statistical plan so that the plan can be approved or modified as our needs require.[238]

153. Before the Arizona investigation could be completed,[239] however, a federal civil complaint challenging the propriety of the joint fixing of escrow rates by the Arizona Rating Bureau was filed by the United States, followed shortly by a *parens patriae* federal suit brought by

[237] RX 93-RX 93A.

[238] RX 93A-RX 93B.

[239] The Arizona Insurance Department investigation apparently did not get much beyond retaining an actuarial consulting firm, Tillinghast, Nelson and Warren, to review the Arthur D. Little material. The Tillinghast firm agreed with Arthur D. Little's conclusion that the rates were not excessive. Bethel 1975, Barberich 2251, 2270, 2281, 2289; RX 93-RX 93B, RX 96 to RX 96Z-1.

Arizona.[240] After the entry of a final judgment in the Department of Justice's case on December 16, 1981, the Arizona Rating Bureau went out of business for *all* purposes (i.e., the fixing of title, search and examination, and escrow rates), and its corporate charter was revoked on October 1, 1983.[241]

Ohio

154. The Ohio Title Insurance Rating Bureau (hereinafter "Ohio Rating Bureau") was authorized to file a joint rate manual for its members after being licensed by the Ohio Department of Insurance in 1972.[242]

155. The practices of the Ohio Rating Bureau, including rate making, were subject to a wide array of latent powers possessed by the insurance superintendent including the right to review rates, conduct audits, hold public hearings, suspend or revoke the bureau's license, promulgate statistical plans, and issue orders directed at practices that were unfair, unreasonable, or inconsistent with the insurance statute.[243]

156. The rate filings of the Ohio Rating Bureau were made pursuant to the "file and use" approach—after a 15 day waiting period, which could be extended for an addi-

[240] Wilkie 2102-06; RX 97"T", RX 98C.

[241] Wilkie 2106; RX 99.

[242] Smith 2961-62; JXA, pp. 219-20; RX 233.

[243] JXA, pp. 218-25. That at least some of these powers are purely latent is shown by the fact that no audit was ever conducted by the Department of Insurance although the statute requires an audit at least once every five years. Smith 3033. There is no requirement under Ohio law that insurance rate filings must be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with each rate filing.

tional 15 days, the rate became effective unless it was disapproved by the Superintendent of Insurance.[244]

157. The general statutory standard for rate review in Ohio is that rates shall not be excessive, inadequate, or unfairly discriminatory. In considering whether this standard has been met, the insurance superintendent is directed to consider "[p]ast and prospective loss experience," a "reasonable margin for underwriting profit and contingencies," dividends, past and prospective expenses, and "all other relevant factors." [245]

158. Between 1972 and 1983, all rates filed by the Ohio Rating Bureau covered "risk" only. None of these filings purported to contain charges for search and examination services or settlement services.[246]

---

[244] JXA, pp. 218-19; Ratchford 3101-02. Rate filings are only made public after the effective date. Ratchford 3087. While the Ohio statute does not require explicit prior approval of rates (see § 3935.04(D), Ohio Revised Code, JXA, p. 218), in practice the state apparently has acted under the assumption that prior approval is required. Compare Ising 3050 with Ising 3061. See also Ratchford 3101-02.

[245] JXA, p. 217.

[246] Smith 2966, 3036; CX 75F, CX 84F, CX 101F, CX 238G. Major rate filings were made in 1972, 1978 and 1981. Soon after the 1972 filing, the Ohio Rating Bureau retained Dr. Irving Plotkin of Arthur D. Little to draw up statistical and financial plans intended, essentially, to show profit calculated on the basis of a return on total capital invested. Plotkin also did pro forma analyses of rate increases filed by the bureau. Plotkin testified that although he was compensated by the Ohio Rating Bureau for the work done on these rate matters, he was actually in an adversary position in dealing with the bureau since for all practical purposes he was taking his direction from a Department of Insurance which was hostile to the bureau. Plotkin 2508-10, 2511-13. Plotkin's perception of an adversary relationship is not shared by his sponsors. A few months prior to the September 17, 1981, Ohio filing, an officer of respondent Lawyers Title expressed

159. The Ohio Department of Insurance considered all filings of the Ohio Rating Bureau as covering risk only, and as specifically not including charges for search and examination and settlement services.[247]

160. Respondents independently set and published charges for search and examination services and settlement services. These charges were not submitted for review to the Ohio Department of Insurance.[248]

161. Complaint counsel's entire case on the search and examination issue in Ohio rests on the supposition that because rates were justified on the basis of rate of return

---

the following thoughts about Arthur D. Little's role in Ohio rate making:

> While Lawyers Title is certainly not the only company in Ohio, I wonder if we would not find that many other companies would not feel similarly about the suggested rate increases. Before asking Arthur D. Little to massage these suggested revisions, I suggest that we try to determine if the suggestions would be palatable to the majority of [Ohio Rating Bureau] members. CX 335. See also CX 330A in which Dr. Plotkin is described by the Ohio Department of Insurance as an "advocate" of the Wisconsin Rating Bureau.

While the principal rate filings and supporting papers of the Ohio Rating Bureau, including the Arthur D. Little submissions, were reviewed by the insurance department (Smith 2963, 2986-90; CX 93A; RX 235-RX 235B, RX 239-RX 239A, RX 241-RX 241B, RX 249-RX 249B, RX 276, RX 277), the record indicates that these rates were approved notwithstanding reservations within the department about the adequacy of the justification, especially the use of the rate of return on total capital as a basis for rate making. Smith 3015; CX 330A-B, CX 331. A minor endorsement filed in 1979 was rejected because it lacked justification (RX 259-RX 260) but other amendments and endorsements, which were filed during the period 1980 to 1983, apparently were approved with little or no accompanying justification. Smith 3030-31; CX 97A, CX 99A.

[247] Ising 3060; RX 289. See also RX 290-RX 290B.

[248] Malaker 825-26, Sinkhorn 900, Smith 3036-37.

on total capital they must of necessity be inflated to include such non-risk elements as the cost of conducting a search and examination and settlement.[249] While the record indicates that Ohio risk rates may be higher than risk rates elsewhere,[250] there is no evidence to support the complaint allegation that respondents have used the rating bureau to establish uniform charges for search and examination and settlement services.

162. Respondents are no longer members of the Ohio Rating Bureau.[251]

Idaho

163. The establishment in 1974 of the Idaho title insurance rating bureau (Idaho Title Insurance Service Organization, Inc., hereinafter "Idaho Rating Bureau") as a medium for establishing joint rates, was authorized by the Idaho insurance statute which requires that a title insurance rating bureau obtain a license from the Director of the Department of Insurance, and that it have as its members at least six title insurers who together account for 50 percent of the title insurance premiums written in the state. The license was granted after a hearing before the insurance department.[252]

[249] See CX 91A to Z-154. Neither side in this litigation pressed the argument that rates in rating bureau states are higher or lower than rates elsewhere, or that states which actively supervise rating bureaus have lower or higher rates than states which have little supervision. As far as this record will allow, comparisons cannot be made because the cost of conducting the search and examination differs from state to state. See Bethel 1914-15.

[250] See CX 171. The record also indicates that on some occasions an insurance company agent will not charge a large customer for search and examination. Waiwood 1109.

[251] Smith 3033.

[252] JXA, pp. 184-85; CX 46A-CX 49A.

164. The Idaho Rating Bureau was subject to inspections by the Department of Insurance, and on three occasions the department made an audit of the financial records of the bureau.[253] Other latent powers of the department included the authority to revoke the bureau's license, to issue orders condemning practices that were inconsistent with the insurance statute, and to hold hearings on rates. Hearings, which are only required when a rate is disapproved, were not held on any of the bureau's rate filings.[254]

165. The joint rate filings of the Idaho Rating Bureau were made pursuant to Section 41-2706 of the *Idaho Code* which requires a 30 day waiting period and the affirmative prior approval of the Director of the Department of Insurance [255] (in contrast to the "file and use" or "use and file" approaches previously noted in Connecticut, Wisconsin, Ohio, Arizona, and Montana).

166. Approval of rates, according to the Idaho insurance statute, is presumably based on a determination by the Director of the Department of Insurance that the proposed rates are not excessive, inadequate, or unfairly discriminatory. The statute further provides that in reviewing title insurance rates the director should take into

[253] Mitchell 2907, Fraundorf 3444-45; JXA, pp. 168-70, 175-76, 180, 184-86, 188; RX 194 to RX 195Z-15, RX 201-RX 202, RX 204-RX 204A, RX 206-206N, RX 224-RX 224S. After its 1976 examination, the insurance department required the Idaho Rating Bureau to take steps to resolve an apparent conflict of interest between the official duties of one of the bureau's officers and the officer's outside insurance business. RX 196-RX 200.

[254] Mitchell 2922, 2939; JXA, pp. 173-74, 180-81. There is no requirement under Idaho law that insurance rate filings must be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with each filing.

[255] Fraundorf 3446; JXA, pp. 180-82.

account the state's policy of maintaining stability in insurance rate structures, the necessity for protecting the financial solvency of title insurers and their agents in periods of economic depression by encouraging growth in periods of business expansion, and the desirability of inducing capital to be invested in the industry by assuring a reasonable margin of underwriting profit.[256]

167. The Idaho insurance statute further provides that all title insurance rate must be justified but insurers are given wide latitude as to the form of the justification – i.e., experience, judgment, statistical data, the experience of other insurers or rating bureaus, and any other factors deemed relevant.[257]

168. Under the statutory scheme outlined in Findings 163-167, the Idaho Rating Bureau filed its first major rate proposal on October 3, 1975. Consideration of this filing was suspended as the Department of Insurance convened a public hearing to consider its Amended Regulation No. 25, which related to the use of inclusive rates and a variety of other matters – minimum rates, reissue rates, cancellation fees, the application of the basic rate schedule to special situations, and the amount of insurance that could be purchased in a particular transaction. Following promulgation of Amended Regulation No. 25, the Idaho Rating Bureau refiled its manual and justification (including agent income tax returns) which the Department held open for public inspection for 30 days. During that time, the rate was referred to the department's outside title insurance consultant. The consultant provided his analysis, and on January 20, 1976, the department approved the filing, effective March 1, 1976,[258]

[256] JXA, p. 181.

[257] JXA, p. 181.

[258] Mitchell 2883-91; CX 56A-58S; RX 167-RX 182V.

169. The Idaho Rating Bureau filed its only other across-the-board rate increase with the Department of Insurance on December 15, 1980. After subpoenaing data from the members relating to insurer expenses, and on the recommendation of a retained consultant, the department approved the manual effective February 16, 1981, contingent upon the receipt of still additional material from two insurers explaining large increases in expenses in 1978.[259]

170. There is no convincing evidence that the Idaho Insurance Department has failed to consider any insurer expense which might impact on rates, including agent retention expense.[260]

171. The Idaho Rating Bureau was dissolved, effective November 29, 1984.[261]

Montana

172. The Montana title insurance rating bureau (The Montana Title Insurance Service Organization, Inc., hereinafter "Montana Rating Bureau") was authorized to establish joint rates for its members after being licensed by the Commissioner of Insurance on July 19, 1982.[262]

173. Under Montana insurance law, the activity of a rating bureau, including joint rate making, is subject to the latent power of the insurance commissioner to inspect

[259] Mitchell 2891-98; RX 183-RX 193. Miscellaneous rate adjustments, forms, and endorsements were filed and approved throughout the period 1974-1984 with apparently little or no review by the insurance department. Mitchell 2925-39, Fraundorf 3434-42; CX 62A-71B; RX 207-RX 223.

[260] See Mitchell 2941-51, Fraundorf 3447-48, 3451-53.

[261] Mitchell 2907-08; RX 203-RX 205.

[262] Statton 2855-57; JXA, pp. 196-97, 200-06; CX 36-CX 40G.

the bureau and if warranted revoke its license, hold hearings on rating bureau practices, and issue orders requiring compliance with the insurance statute.[263]

174. The Montana Rating Bureau filed its jointly fixed rates under a "file and use" system whereby rates for title insurance become effective as soon as they are filed with the Department of Insurance.[264]

175. The statutory standard for reviewing title insurance rates in Montana is that the rates should not be excessive, inadequate or unfairly discriminatory.[265] The Montana insurance statute further provides that title insurance rate filings must contain supporting data, and the insurance department is directed, with the aid of the rating bureau, to promulgate statistical plans that could be used to determine whether rates met the statutory standards.[266]

176. Under the statutory scheme outlined in Findings 172-175, the Montana Rating Bureau made its only major rate filing, which included charges for search and examination, on February 22, 1983. Citing as justification for an increase, nationwide loss figures, a decline in

[263] JXA, pp. 196-97, 200-02, 210-12. In practice, Montana held no hearings respecting title insurance rates filed by the Montana Rating Bureau. Statton 2869. There is no requirement under Montana law that insurance rate filings must be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with respect to each rate filing.

[264] Statton 2864; JXA, p. 200; CX 343B.

[265] JXA, pp. 199, 208-09. The broad statutory language is further refined by definitions of excessive ("unreasonably high for the insurance provided under circumstances where a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable"), and inadequate ("unreasonably low for the insurance provided such that the continued use of such rate either endangers the solvency of the insurer using the same or . . . the use of such rate by the insurer using same has, or if continued will have, the effect of destroying competition or creating a monopoly"). JXA, p. 199.

[266] JXA, pp. 200, 208-09.

operating profits, and reduced home sales, the bureau's filing included a commitment to gather statistical data and undertake a profitability study for all underwriters and agents in Montana during the year 1984 in order to provide further support for the rate.[267]

177. In connection with the February 22, 1983 filing, a representative of the Montana Rating Bureau met with officials of the Montana insurance department, and apparently was told that while the increase would go into effect immediately, additional support would have to be provided in the form of financial data showing the profitability of agents and insurance companies for the past five years. There is no evidence that this material was ever provided.[268]

178. As far as this record will allow, Montana insurance officials examined agent retention expenses both before and after the creation of the Montana Rating Bureau, and there is no evidence that the state's method of dealing with the problem, i.e., by giving the insurance commissioner specific authority to disapprove excessive fees, has been ineffectual.[269]

[267] Statton 2857-60; CX 41A-W. An October 14, 1984 filing of the Montana Rating Bureau was basically a clarification of the 1983 filing plus an increase in the charges for special endorsements. Statton 2860-63; CX 43A-CX 44E. By the time this filing went into effect on January 2, 1985, respondents had largely withdrawn from the rating bureau. Statton 2856-57, 2862-63; CX 45; RX 225-RX 226, RX 228-RX 230.

[268] Statton 2862, 2865-68; CX 41A-W, CX 343A-D; RX 227.

[269] Plotkin 2691, 2714-17. Section 33-25-302 of the Montana Title Insurance Act of 1985 provides as follows:

> **33-25-302. Disapproval of agency contracts.** (1) The commissioner may disapprove a title agency contract between a title agent and title insurer, upon appropriate notice to the parties to the contract, if he finds that the contract, together with all amendments and related documents:
>
> (a) does not provide for adequate monitoring of the agent's financial transactions; or

179. Between July 1, 1983, and January 22, 1985, respondents resigned from the Montana Rating Bureau.[270]

I. SETTLEMENT OR ESCROW SERVICE

180. Settlement services, sometimes referred to as closing or escrow services, embrace the ministerial functions of carrying out the parties' instructions respecting the execution, delivery, and recording of the deed and mortgage and payment of purchase money. The settlement clerk (also known as an "escrow officer" or simply a "closer") may also be called on to pay taxes and fees and he may assist in the calculation or adjustment of prorated items such as utility charges.[271]

181. While the settlement date usually coincides with the date of issuance of the final title policy (the insurer having directed a "bring down" or "mini" record search and examination between the date of the binder and the date of the settlement in order to be certain that no new title defects have surfaced), there is no evidence that this minor extension of the search and examination process

---

(b) provides for inadequate, unreasonable, or excessive amounts to be paid to or retained by the title agent. Factors the commissioner may consider in this determination include but are not limited to the agent's duties under the contract and the general level of amounts paid to or retained by other title agents in the state performing or assuming comparable duties.

(2) No person may act as a title agent under an agency contract that has been disapproved by the commissioner.

Section 33-25-302 is patterned after the NAIC Model Title Insurance Act. See RX 502Z-114.

[270] RX 225-RX 230.

[271] Fromhold 956-58, Waiwood 1047, Armstrong 1162-63; CX 155D, CX 196Z-60 to Z-65, CX 238F-H, CX 244Z-52 to Z-62, CX 305; RX 409L, T, RX 421E, RX 427Z-135, RX 431Z-116 to Z-118. Depending on local customs, settlement may be done by mail ("escrow closing") or by the parties meeting and exchanging documents ("table closing"). Waiwood 1096, Everbach 1357-59.

somehow transforms the ministerial functions of settlement or escrow into the business of insurance.[272]

182. Respondents also claim that the settlement process functions to disclose title defects that do not appear on the public records. For example, the closing officer in reviewing the papers may uncover additional encumbrances on the property, or the closing officer also may require identification of the parties, a procedure which could disclose an attempted forgery. In addition, the closing officer reviews affidavits or other documents upon which the insurer will rely to remove what otherwise would be listed as "exceptions" on Schedule B of the title insurance policy.[273] There is no evidence, however, that these functions need be carried out by title insurers. As far as this record will allow, all aspects of settlement or escrow are adequately performed by real estate brokers, attorneys, banks, independent escrow companies, and title insurers, all of whom aggressively compete for settlement business on the grounds that each is more expert than the others in performing the clerical duties constituting settlement or escrow.[274]

183. Settlement is treated by respondent insurers as a discrete service which is ancillary to the title insurance business.[275]

---

[272] Ippel 657, Malaker 735, Armstrong 1155-56, 1180, Ferraro 1204, Bonita 1278-79, 1284, Everbach 1330-31; CX 196Z-65, CX 222Z-121; RX 389Z-221.

[273] Ippel 654, Sinkhorn 892-97, Fromhold 956-63, Waiwood 1114-16, Armstrong 1162-64, Everbach 1356-61, Bowling 3322-24, 3349-51; CX 196Z-69 to Z-70, CX 222Z-129 to Z-130, CX 244Z-58; RX 399C-D, RX 442H-"T".

[274] See Sinkhorn 899-900, Waiwood 1113-16, Armstrong 1176-77, Everbach 1367, 1372, 1401-02, Bowling 3323, 3350-51, 3370-71; CX 196Z-73, CX 316B.

[275] Everbach 1363; CX 87M, CX 238C, K, CX 293D, CX 310"T"; RX 263J, RX 327A.

184. The costs which go into making up settlement fees have nothing to do with risk assumption, risk spreading, or any other insurance consideration. These fees are based on such factors as whether the settlement is held in the closer's office or not, how long the closing takes, travel time, highway tolls, the price of gasoline, and parking fees.[276]

185. Complaint counsel have pressed the issue of alleged illegal fixing of settlement services through rating bureaus in five states—Arizona, Connecticut, Ohio, New Jersey and Pennsylvania (see Findings 186-189).

186. While the complaint alleges that the charges for settlement services were fixed in Arizona (and there can be no question that beginning in 1977 the Arizona Rating Bureau set escrow rates collectively),[277] this issue is not properly before the Federal Trade Commission. Settlement or escrow services in Arizona were investigated by federal authorities, and until December 1991 are the subject of a comprehensive judgment as well as the continuing jurisdiction of the United States District Court For The District of Arizona.[278]

187. Complaint counsel argue that the "risk rate" which prevails in Ohio not only includes a hidden search and examination charge, but also an amount representing a jointly set settlement fee. There was a failure of proof on this issue.[279]

188. Complaint counsel argue that both the approved attorney (risk) rates and inclusive rates filed in Connecticut were based in part on escrow expenses. While escrow expenses may have been used to justify rate increases,[280] there is no evidence that respondents charged uniform settlement or escrow fees in Connecticut.

[276] CX 276P; RX 4N, RX 8E, RX 9D, E, RX 10C, RX 11D, RX 13A.

[277] Wilkie 2095, 2122; RX 63-RX 63Z, RX 67-RX 67E.

[278] Civ. 80-769 (Judgment of U.S. District Court For The District of Arizona, December 16, 1981).

[279] See Findings 158-161.

[280] CX 20Z-18 to Z-19.

189. Settlement fees have been included in jointly established rates in Pennsylvania and New Jersey.[281] The only issue, however, in these states is the authorization question under *Parker* as it relates to attorney-agents. This is treated in Findings 117-123.

J. MOOTNESS

190. Respondents participated in various state title insurance rating bureaus as follows:

Table 1: Participation by Respondents in Rating Bureaus

State	Respondents (Including First American) Active In Rating Bureau	Active Period of Rating Bureaus
Arizona	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1968 to 1981-82
Connecticut	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1965 to 1985
Idaho	Ticor, Chicago Title, SAFECO, First American, Lawyers Title	1974 to 1984
Montana	Ticor, Chicago Title, SAFECO, First American, Lawyers Title	1982 to 1984-85
Ohio	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1972 to 1984
Wisconsin	Ticor, Chicago Title, SAFECO, Lawyers Title, First American, Stewart	1969 to 1984
Pennsylvania	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1946 to 1983
New Jersey	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1975 to 1983

Sources: Arizona (CX 2, CX 6A, CX 7A, CX 8A; RX 99, RX 472), Connecticut (Ferraro 2300-01, DiSanto 2727-28; CX 23, CX 24, CX 31A-B, RX 102C), Idaho (Mitchell 2907-09); CX 46B, CX 49F, CX 50A, CX 51, CX 55; RX 166-166A, RX 203-203H, RX 205) Montana (Statton 2856-57; CX 40A-B, CX 41H; RX 226, RX 228-230), Ohio (Smith 3033; CX 72A-C, CX 74A-R), Wisconsin (CX 103-CX 109; RX 385), Pennsylvania (CX 128A-128B, CX 134A), New Jersey (CX 277D, CX 279E, CX 280E, 281D, CX 282E, CX 283E, CX 285D)

[280] CX 30Z-18 to Z-19.

[281] Settlement fees were taken out of New Jersey rating bureau schedules as of August 2, 1983. CX 284C. For inclusion of settlement

191. While respondents are not presently members of any state rating bureaus which jointly fix the rate for search and examination or settlement services, there was no testimony from respondents' officers, or any other evidence that respondents have abandoned the notion of forming title insurance rating bureaus in the future.

III

DISCUSSION

Respondents, who rank among the nation's largest title insurers, have at one time or another been members of rating bureaus which establish uniform rates for title search and examination and settlement services. Participation by respondents in these rating bureaus raises two main questions: first, whether joint rate making respecting search and examination and settlement services relates to the "business of insurance," and is therefore exempt from the antitrust laws under the McCarran-Ferguson Act ("McCarran Act"); and second, whether this joint rate making, even if it is not exempt under the McCarran Act, is nevertheless beyond the reach of the federal antitrust laws by reason of the "state action" (*Parker*) doctrine since the rating bureau activities of respondents reflect a policy of the relevant states to suspend competition and are actively supervised by these states.

The "Business of Insurance"

In 1945, Congress passed the McCarran Act for the purpose of removing the "business of insurance" from the reach of the federal antitrust laws to the extent that it is regulated by state law.[282] The act was passed in response

fees prior to 1983 see CX 277Z-3 to Z-5. Settlement fees were included on rates filed by the Pennsylvania Rating Bureau as of June 1, 1984. CX 136A-B.

[282] The complaint makes no charge that the subject rating bureaus were not "regulated" by state law within the meaning of the McCarran

to *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944) which held that insurance transactions were subject to federal regulation under the Commerce clause, and that the antitrust laws, in particular, were applicable to such transactions. In order to assure that *South-Eastern Underwriters* would not interfere with the traditional role of the states in regulating and taxing insurance, the McCarran Act provided that the business of insurance (but not the business of insurance companies) would receive the following exemption:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act and the Act of October 15, 1914, as

Act. See RX 486C. While "regulated" in the McCarran Act sense has been found when the general language of the regulatory statute provided for "enforcement through a scheme of administrative supervision," *FTC v. National Casualty Co.*, 357 U.S. 560, 564 (1958), or when the state specifically authorized the questioned activity, *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir.), *cert. denied*, 409 U.S. 917 (1972), see the discussion herein under *State Action Defense* for the more stringent requirements of the *Parker* doctrine.

amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.[283]

As shown by the language cited above, whether the McCarran Act exemption applies to a particular practice engaged in by insurers (such as the joint setting of the rates for search and examination and settlement services) turns on the meaning of the phrase the "business of insurance," an issue which the Supreme Court has recently addressed in two antitrust cases.

In *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), an insurer (Blue Shield), as part of an effort to reduce the cost of meeting prescription drugs claims, entered into "provider" agreements with most of the pharmacies in San Antonio which stated that the prescriptions of policyholders would be filled at a flat rate of $2 plus a direct payment by the insurer to the pharmacies

[283] 15 U.S.C. §§ 1011-1013.

for the cost of acquiring the drugs. If an insured elected to use a nonparticipating pharmacy, the pharmacy's regular price had to be paid, but Blue Shield would then make reimbursement for 75 percent of the difference between the nonparticipating pharmacy's full price and the $2 flat fee. The discrepancy in benefits was obviously designed to discourage policyholders from patronizing nonparticipating pharmacies, with the result that a group of 18 pharmacies, who declined to participate in the $2 plan, challenged the arrangement under the Sherman Act as both a form of price fixing and as a group boycott of nonparticipating pharmacies.

The Court's analysis of the San Antonio plan begins with the caveat that all antitrust exceptions are to be narrowly read so as to cover no more than the objective targeted by Congress for the exemption. Consistent with this basic tenet of statutory construction, all that is exempt from the antitrust laws under the McCarran Act is the "business of insurance" *not* the business of insurers. *Id.* at 211. Whether a particular practice meets this restrictive standard is to be resolved by deciding whether the putatively exempt practice relates to the spreading of policyholders' risk or underwriting. The opinion further suggested that the questioned practice must be an integral part of the contractual relationship between the insurer and the insured, and that the practice must not involve entities outside of the insurance industry.

While *Royal Drug* does not indicate that all three elements must be present in each instance, it is plain from the opinion that no practice can be subsumed within the "business of insurance" rubric unless the first test is met—the activity must minimally relate to risk spreading amongst policyholders since, according to the Court, risk spreading or "underwriting" is a "critical determinant in identifying insurance." *Id.* at 213. Having isolated risk

spreading as the quiddity of insurance, the Court then held that the San Antonio prescription plan received no antitrust exemption because it only pertained to how risks are paid (i.e., how claims are satisfied) and not to risk spreading.

On the way to this result, the Court sounded a cautionary note against ready acceptance of insurance company assessment of its own risk spreading function with the admonition that notwithstanding the trappings of insurance, insurance company activity does not constitute the "business of insurance" if upon close analysis it is found that there is no real risk to be spread. This was the clear meaning of the heavy reliance in *Royal Drug* on *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959) in which self-styled "life insurance" companies offered variable annuity contracts that provided no fixed rate of return but only a pro rata participation in the investment portfolios of the companies. Although the contracts were regulated by state insurance commissions and involved some actuarial prediction of mortality, the Supreme Court there held that since by its terms the contract put all the risk on the annuitants and none on the so-called "insurers," the contracts were not the "business of insurance" within the meaning of the McCarran Act.

In further support of its emphasis on risk spreading as the linchpin of the McCarran Act exemption, the *Royal Drug* Court stated that the primary purpose of the act was to allow for cooperation in insurance rate making because the actuarial uncertainty involved in spreading insurance risks dictated that a prudent insurer would only set its rates after considering the collective claims history of other similarly situated insurers rather than relying solely on its own experience. The Court found support for this presumed need for cooperation in the risk spreading process from the legislative history of the McCarran Act, par-

ticularly in the draft bill and accompanying report of the National Association of Insurance Commissioners (NAIC) released on November 16, 1944, in response to *South-Eastern Underwriters*. The NAIC Report, which the Court describes as "particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Royal Drug*, 440 U.S. at 221, was specifically directed at the need for shared risk experience during the insurance rate making process. Contrasting the relative certainty of the mortality tables used in life insurance with the data that issuers of other forms of insurance (fires, casualty, surety, and inland marine) had to rely on, the NAIC report argued—

> The fire, casualty, surety, and inland marine aspects of the insurance business differ widely from life insurance. In life insurance the gross rates are based upon a number of factors, including mortality tables. Mortality tables are based upon the certainty that everyone must die; the time of death is the only uncertainty. In the other fields of insurance there is no guarantee that the contingency insured against will occur at all. As a result rates in these other fields can be estimated with a lesser degree of certainty. Since rates in these other fields are based upon the law of averages it is manifest that the broader the statistical base the more accurate the average. The experience of individual companies is seldom a reliable guide for rate-making purposes. The structure of the fields of insurance under discussion is based upon these facts of common knowledge. Furthermore, many States have by statutory enactment insisted that companies act in concert for the purpose of collecting statistical data for rate making in these other fields in order to utilize these established principles—principles, we

may add, which are wholly inconsistent with the unrestricted competition contemplated by Federal antitrust laws. 90 Cong. Rec. A4405 (1944).

Contrary to the position advanced by respondents, however, neither *Royal Drug* nor the legislative history cited above suggests that all insurance company collective rate making is exempt. This is the clear holding of *United States v. Title Ins. Rating Bureau of Ariz. ("TIRBA")*, 700 F.2d 1247 (9th Cir.), *cert. denied*, 104 S. Ct. 3509 (1984), which applied *Royal Drug* to deny an antitrust exemption when insurers used a rating bureau to set common rates for escrow services. In *TIRBA*, the fact that the case involved insurers who were engaged in joint rate making was the starting point, not the end of an inquiry which led untimately to the conclusion that the escrow or settlement services had nothing to do with risk spreading and therefore did not meet the "business of insurance" requirement. In reaching this result, the Ninth Circuit noted that there was no real insurance function at stake since escrow services, which essentially involves clerical transfers of papers and payment of consideration, are performed by separate departments in insurance companies or by separate but related companies, and are not only offered by insurance companies when no insurance is involved, but are offered by firms other than insurers.

It is also especially significant to this case that the *TIRBA* court gave short shrift to the title insurers' argument that they should be allowed to fix jointly the rate for escrow services because in the course of performing these services the companies do some evaluation of title defects, and thus the escrow process may have the effect of reducing the risk to them as title insurers. In answer to this argument, the Ninth Circuit, again relying on *Royal Drug*, drew a distinction between risk reduction and risk

spreading, and concluded that even if it can be shown that the settlement process, which includes an updated search and examination of title, helps to identify title defects and thereby reduces the risks of a title insurer, it is nevertheless not within the McCarran Act exemption because risk reduction is not synonymous with spreading risks more widely, and spreading risk, not risk reduction, is at the core of the cooperative risk allocation rationale of the McCarran Act.[284] In other words, *TIRBA* teaches that the McCarran Act should not be read broadly as exempting all rate making by insurers because such an approach not only begs the question as to whether the collective rate making relates to the "business of insurance," but it also ignores the clear admonition in *Royal Drug* that the risk spreading purpose of the exemption must be kept in the forefront in defining the "business of insurance." Certainly once this restricted purpose of the McCarran exemption is accepted, it necessarily follows (consistent with the basic tenet of narrowly applying antitrust exemptions) that the act cannot be interpreted so as to cover insurance company joint rate making that is unrelated to a pooling of risk experience.

Risk spreading and its central importance in defining the "business of insurance" was next taken up by the Supreme Court in *Union Labor Life Ins. Co. v. Pireno*,

---

[284] As in *TIRBA*, respondents have argued here that during closing insurer-related closers verify that on-record liens have been removed and exercise special diligence in spotting off-record risks such as forgery. The *TIRBA* court did not consider these functions as constituting risk spreading or the business of insurance; moreover, there is nothing in this record to indicate that the zeal with which these non-insurance ministerial functions is carried out somehow depends on whether the closer is employed by a title insurer, bank, lawyer, independent closing company, or real estate broker. See Findings 180-184.

458 U.S. 119 (1982), which involved still another antitrust challenge to an insurer's attempt to reduce claims by a restrictive arrangement. There the insurer refused to pay substantial claims for chiropractic services unless the case had been reviewed and approved by a peer review committee. Pireno, a chiropractor, challenged the peer review requirement as a conspiracy and attempt to boycott. The Court confirmed the three-prong test suggested by *Royal Drug* in holding that the arrangement between the insurance company and the chiropractors was not part of the business of insurance since this practice, like the San Antonio prescription plan in *Royal Drug*, was aimed at reducing the cost of satisfying claims rather than risk spreading. *Pireno* added a gloss to the *Royal Drug* emphasis on risk spreading by saying that the practice must be "logically and temporally" connnected to the spreading of risk, 458 U.S. at 130], but the result was the same as in *Royal Drug*—the review by the chiropractor peer committee was stricken because it was simply an aid in the claims payment process, and did not actually involve the spreading of risk.

Given the emphasis in *Royal Drug* and *Pireno* on risk spreading, respondents' insistence that *Equifax Inc.*, 96 F.T.C. 844 (1980) is dispositive is off the mark. The Commission held in *Equifax* that the McCarran Act exempts the deceptive gathering of medical histories because presumably the material was to be used in the process of spreading risk. The Commission's decision, however, has no bearing here since the record shows, as I will indicate later, that neither search and examination in general, nor the joint setting and examination fees in particular, have anything to do with spreading risk amongst an actuarialy determined class of insureds. Equally misplaced is respondents' heavy reliance on *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77 (10th Cir.

1973); *McIlhenny v. American Title Ins. Co.*, 418 F.Supp. 364 (E.D. Pa. 1976), and *Schwartz v. Commonwealth Land Title Insurance Co.*, 374 F.Supp. 564 (E.D. Pa. 1974) for the proposition that search and examination cannot be separated from the risk portion of title insurance. These cases, all decided before *Royal Drug*, have been distinguished as not having applied properly the crucial risk spreading test to discrete services offered by title insurers. *TIRBA*, 517 F.Supp. 1053, 1057, n. 2, *aff'd*, 700 F.2d 1247, 1251, n. 1.[285]

In focusing on risk spreading, I also necessarily reject respondents' argument that collusion by title insurers is exempt if not undertaken for the purpose of risk spreading, but rather to preserve their status as reliable insurers. The Court in *Royal Drug* specifically considered and dismissed the "reliable insurer" standard as too broad since every business decision made by an insurance company arguably has some impact on its status as a reliable insurer. 440 U.S. at 216-17. As for the legislative history, all that it will allow on this point is that a secondary purpose behind the McCarran Act was to permit the collective sharing of risk experience in order to preserve the solvency of insurers. But this limited objective cannot be transformed into a

[285] Post-*Royal* and *Pireno* cases which have allowed the exemption have turned on a factual determination that the questioned activity relates to risk spreading. *See Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928, 932 (9th Cir.), *cert. denied*, 104 S. Ct. 2346 (1984) (exemption allowed because "[t]he effect is to spread risk across a wide area, and that is precisely what the Supreme Court described when it formulated the risk spreading criterion"); *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1286 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983) (exemption allowed because "[i]t is the actuarial uncertainty inherent in projecting risks and the insurance industry's corresponding need for cooperation that makes its exemption from antitrust laws appropriate").

blanket approval of all rate fixing by insurers irrespective of the connection to risk allocation.

Finally, respondents argue that even apart from any consideration of risk spreading, there should be an exemption here because the states treat search and examination and settlement as part of the "business of insurance." But what constitutes the "business of insurance" under the McCarran act is a federal not a state question, and all cases from *Variable Annuity* to *Royal Drug* and *TIRBA* have not resolved that question on the basis of the state's definition of insurance. See, e.g., *TIRBA*, 700 F.2d 1249-50.

Turning then to the crucial risk spreading issue raised by *Royal Drug*, and putting aside for the moment the question of escrow or settlement services which was largely disposed of in *TIRBA*, I look to what the record tells us about search and examination.

To begin with, the record shows that historically search and examination were offered, and are still offered, apart from any concept of insurance or insurance risk spreading, and while the services have been engrafted onto an insurance framework as part of an overall marketing strategem designed to win the business of assuring good title away from abstractors and conveyancers, this does not logically transform the basic nature of the services, which are still largely ministerial functions irrespective of the particular evidence of good title that is the ultimate objective of the search and examination. But having largely succeeded in winning this competitive struggle for the search and examination business, respondents would then crown their triumph with an antitrust exemption although in the past their competitors were turned down in a comparable attempt at consolidation of market power. Thus in Virginia, where examination for title insurance may only legally be performed by lawyers, the bar sought to protect its monopoly against price competition by use of a

minimum fee schedule which was defended on the grounds that the services were being performed by a learned profession. After paying due deference to the practice of law as a scholarly pursuit, the lawyers who sit on the Supreme Court had no difficulty in recognizing search and examination as integral parts of the real estate business and held, "[w]hatever else it may be, the examination of a land title is a service." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). This easily identifiable service does not undergo a sea change, as respondents argue, when independent attorneys, for example, who were the subject of *Goldfarb*, don attorney-agent or approved attorney hats, and along with their other wares—abstracts, certifications, and opinions—now offer search and examination in an insurance package.

Second, the record shows that search and examination are regarded by respondents themselves as discrete services which are usually billed at a price that is entirely removed from any consideration of whatever risk element may be involved in title insurance. That is, even assuming that there is some small risk involved in title insurance (a point which will be taken up later) the risk has been isolated and assigned a dollar value for rate making purposes which is entirely apart from the non-risk part of the premium represented by the cost of conducting the search and examination. While this separation of search and examination from the risk element of a title insurance premium is most clearly shown by the existence of separate "risk" rates, it is also seen in the promulgation of inclusive rates that simply combine separate risk and search elements. The existence of this risk component—which is not challenged by complaint counsel (except in Ohio where it is alleged that the risk rate is inflated to include search and examination as well as settlement services)—is convincing evidence of a clear distinction between the search and examination func-

tion and whatever risk is assumed in the title insurance policy.

As for the joint setting of search and examination rates—the precise subject of this proceeding—this has no logical connection whatever to risk spreading since there is no evidence that joint rate making is undertaken by title insurers for the purpose of sharing their collective risk experience. To the contrary, the record evidence is overwhelming that both joint and individual rates for title insurance (i.e., apart from the "risk" rate) are set by looking to the cost of performing the search and examination service rather than the claims experience of insurers. This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurer, and therefore the basic rationale of the McCarran Act—that is, the presumed need for insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present.

As it happens, the connection between any aspect of title insurance and the notion of risk spreading is tenuous in the extreme. Few risks are assumed by title insurers since the very purpose of the entire title insurance process—from search and examination to binder to issuance of a final policy—is to eliminate risks by making certain that any serious defects in title are identified for the very purpose of seeing to it that they are not insured. To the limited extent that some risks are assumed by the title insurer, this, too, has nothing to do with the concept of risk spreading by a group of insurers. Disclosed risks are covered on the basis of individual company's legal analysis of the seriousness of the recorded title defect as balanced against competitive pressure to insure over the risk or lose the business to another title insurer. Again, this is contrary to the very purpose of the McCarran Act since

risks are not underwritten on the basis of a collective pooling of risk experience.

As for hidden risks, this modest extension of title insurance beyond the scope of the abstract and the attorney's opinion has nothing to do with either search and examination or risk spreading since by definition the service at issue here—search and examination of public records—cannot allocate amongst a universe of insureds what it could not uncover in the first place. In any event, there is not a whit of evidence that these hidden risks are somehow spread among policyholders during the rate making process on the basis of the shared risk experience of the insurer members of rating bureaus.

In sum, since the central purpose of the McCarran Act is to allow for cooperation in the setting of rates so that insurers may take advantage of their collective experience in spreading risk, there clearly should be no exemption here because search and examination rates are not only unresponsive to collective risk experience, but do not even reflect the risk experience of the individual insurer. Moreover, even apart from rates, the services themselves are not logically connected to risk assumption since the standard practice in the title insurance business is to exclude all elements of uncovered risk from the policy.[286]

[286] There is no basis on this record for concluding that respondents' joint rate fixing practices should be condemned under the remaining two *Royal Drug-Pireno* criteria, i.e., the practice must not relate to entities outside of the insurance industry, and must be part of the insurer-insured relationship. There is no allegation in this complaint that respondents have extended their price-fixing activities to approved attorneys, independent attorneys, abstractors, surveyors, or anyone else besides their own agents and employees. And while search and examination in general and joint rate making in particular have nothing to do with risk spreading, there can be no question that these services (and the charges for these services) are part of the relationship between insurer and insured in the sense that the search and examina-

The State Action Defense

While I have concluded that the search and examination and closing services (see discussion herein under *Settlement Services*) are not the business of insurance under the McCarran Act, respondents' joint rate making activities through rating bureaus would still be exempt from the federal antitrust laws if they met the requirements of the *Parker* doctrine as refined by *Midcal* and *Southern Motor Carriers*.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court held that Congress did not intend to apply the antitrust laws to state action regulating economic activity within its own borders, and while some state action may be invalid, say, blanket authorization by a state that businesses may violate the federal antitrust laws without regard to state supervision, the practices involved in *Parker* (a state-sponsored but grower-administered program for limiting raisin production) were held to be a proper exercise of state discretion. In its opinion, the Court indicated that the exemption was derived from the policy favoring a spirit of accommodation within our federal system in order to avoid unnecessary conflict between the mandates of national law governing interstate commerce and state regulation of intrastate activity that may have interstate implications. According to the Court, the exemption was also derived from the Tenth Amendment reservation of state sovereignty, as well as the belief that the states performed the useful function of serving as economic laboratories where diverse forms of regulation may be tested without interference from the federal government.

---

tion determines what is excluded from the policy, and the joint rate making determines how much the insured pays for the coverage received.

The *Parker* doctrine lay largely dormant for some 40 years until there appeaered a spate of cases, both private and public, challenging under the federal antitrust laws alleged anticompetitive actions by states and municipalities as well as the practices of private persons acting under the color of state law. In response to this wave of state action cases, there eventually evolved a restatement of *Parker* which provided that before any restrictive practice departing from the competitive norm can qualify for the state action exemption, first, it must be demonstrated that the state's intention to grant federal antitrust immunity is clearly articulated and affirmatively expressed as a matter of policy, and second, that the state actively supervises the process chosen to replace the competitive market. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). As it happens, the second prong of *Midcal* could not be met in *Midcal* itself since there was no state involvement beyond a statute requiring liquor wholesalers to charge prices posted by producers. Despite the outcome in *Midcal*, prior to 1985, enforcement actions involving the claim of a state action exemption largely concentrated on the first *Midcal* test since it was assumed that the more complex issue of state supervision presumably did not have to be faced unless the state compelled the anticompetitive conduct as proof of a clearly articulated and affirmatively expressed state policy to suspend the federal antitrust law. *See, e.g., Mass. Furniture and Piano Movers Ass'n. ("Mass. Movers")*, 102 F.T.C. 1176, *rev'd and remanded*, 773 F.2d 391 (1st Cir. 1985). The *Parker* doctrine underwent a further revision, however, on the basis of the Supreme Court's opinion in *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985) in which the Court rejected the notion that the first prong of the *Midcal* test requires compulsion, and held, instead (in a case involving joint rates filed by motor

carrier rating bureaus) that a state policy to suspend competition may be made manifest by the mere authorization of joint activity to the point that even a statutory reference to just and reasonable rates may be taken as an adequate indication that the state intended that rates were not to be set by the competitive market.

Because of the dramatic impact of *Southern Motor Carriers*, even before the first witness was heard in this case, complaint counsel conceded that it would not contest certain key aspects of respondents' state action defense. Thus complaint counsel acknowledged in its pre-trial brief that respondents' alleged price fixing activities in Arizona, Connecticut, Idaho, Montana, Ohio, and Wisconsin "are undertaken pursuant to a clearly articulated and affirmatively expressed state policy and satisfy the first prong of the *Midcal* test." Complaint Counsel's Trial Brief (Legal Analysis) at p. 24 (Sept. 16, 1985). As for these six states, the only aspect of the state action defense which complaint counsel challenge is whether there is active state supervision. Respecting New Jersey and Pennsylvania, complaint counsel stipulated that there was active state supervision. Stipulation dated 11-25-85. Complaint counsel also conceded that it did not intend to challenge under any theory "price fixing in New Jersey or Pennsylvania on charges for search and examination and settlement services that do not involve attorney-agents." Complaint Counsel's Trial Brief (Legal Analysis) at p. 24, n. 58 (Sept. 16, 1985). Finally, with respect to the five other states cited in the complaint (Louisiana, New Mexico, New York, Oregon, and Wyoming), these were dropped entirely from complaint counsel's case because "the quantum of proof necessary to resolve the question whether a state action defense is available appears to be greater than we originally anticipated" (Complaint Counsel's Trial

Brief at p. 2 Sept. 16, 1985), an obvious concession to *Southern Motors Carriers*.

As a result of complaint counsel's stipulations and concessions, the *Midcal* issues remaining under the state action point are first, whether there had been state authorization for joint fixing of charges paid to attorney-agents in New Jersey and Pennsylvania, and second, whether in Connecticut, Wisconsin, Arizona, Idaho, and Montana the rating bureau activities came under active state supervision. Ohio presents a special problem of determining whether search and examination rates were fixed at all.

The "authorization" issue in New Jersey and Pennsylvania is a question of statutory interpretation. Both states have authorized the joint filing of rates by the respective bureaus, and the only remaining issue is whether these states intend to include in the jointly fixed rates charges for search and examination and settlement when these services are performed by attorney-agents. While the statutes are ambiguous, New Jersey and Pennsylvania insurance regulators have clearly interpreted them to mean that the fees charged by all agents, including attorney-agents, should be regulated by the state insurance departments and may properly be fixed by the joint activity of the rating bureaus. The contrary view urged by complaint counsel may have been more creditable had it been shored up with testimony, documentary evidence, or citation to legislative history indicative of special circumstances (say, a successful campaign by the legal lobby in support of the parochial view that everything an attorney does should only be regulated by the bar or the judiciary), which might have justified an interpretation of the statute representing an extreme departure from the basic policy of these two states, i.e., to regulate (and concededly to supervise actively) all aspects of the title insurance business.

The other prong of the *Midcal* test—"active supervision"—is an emerging concept that the Supreme Court has yet to flesh out. In *Midcal* itself, the only Court case to address the point directly, California required liquor wholesalers to post retail prices, which in turn had to be charged retailers. The Court observed that, "The State neither establishes prices nor reviews the reasonableness of the price schedule; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program." 445 U.S. at 105-06. All that the state did in *Midcal* was simply to issue a directive that wholesalers must either file fair trade contracts or if they did not have fair trade contracts, they must post a resale price schedule which the retailers had to charge. From these facts the Court concluded that California exercised only a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106.

Southern Motor Carriers did not add significantly to *Midcal*. It only contained a passing reference to the active supervision concept since the case was disposed of on the "authorization" basis. At several points in the decision, however, the Court touched on the issue. The Court noted, "Here the Court of Appeals found, and the Government concedes, that the State Public Service Commissioners actively supervise the collective ratemaking activities of the rate bureaus", 105 S. Ct. at 1730, and in n. 23, *id.* at 1729, the Court said—

> Contrary to the Government's arguments, our holding here does not suggest that a State may "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown*, 317 U.S. at 351, 63 S. Ct., at 313-314; see *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S. Ct. 745, 95 L.Ed. 1035 (1951). A clearly articulated *permissive* policy will satisfy the first prong of the *Midcal* test. The second prong, however, prevents States from "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106, 100 S.Ct. at 943. This active supervision requirement ensures that a state's actions will immunize the anticompetitive conduct of private parties only when the "state has demonstrated its commitment to a program through its exercise of regulatory oversight." See I P. Areeda & D. Turner, *Antitrust Law* ¶ 213a, p. 73 (1978).

From the fragments in *Midcal* and *Southern Motor Carriers*, and from the Supreme Court's favorable citation to Areeda and Turner, complaint counsel urge the adoption of a strict procedural test for active supervision, which they claim finds support in the following discussion in that authoritative treatise—

> . . . [state] agency inaction fails to satisfy the requirement of this Paragraph that there be adequate public supervision. Such inaction evades statutory approval procedures designed (1) to accord opponents the opportunity to present facts and arguments against the challenged act, (2) to assure conscious consideration by those particular state officials charged with the power and responsibility for approval, and (3) to allow judicial review of the agency record. Therefore, the general view is correct that official inaction does not constitute sufficient "state action" to justify an antitrust exemption. I P. Areeda & D. Turner, *Antitrust Law* ¶ 213f, pp. 78-79 (1978).

These comments by Areeda and Turner cannot be fairly transformed, as complaint counsel argue, into a hard and fast rule that for each rate change there must be a notice,

opportunity for comment (preferably through a hearing), and a written decision appealable to the courts. I believe that what Areeda and Turner were suggesting instead is that state inaction obviously does not show conscious review as would be evidenced, for example, by a hearing, argument, and a record. This does not mean that these procedures are the only ways of showing state review or are even the preferred way. For one thing, it could be argued that the adoption of such strict procedural requirements, which complaint counsel acknowledge are modeled on the federal Administrative Procedure Act, may be inconsistent with the *Parker* doctrine's underlying rationale of allowing the states to experiment with alternative means of regulation. Moreover, by making procedural fastidiousness the focus of the active state supervision inquiry, this may have the adverse effect of diverting public attention away from the diligence of state insurance commissioners, which in the real world may be the only effective protection for consumers whenever non-competitive pricing norms are adopted. Besides, insistence on strict procedural conformity can quickly degenerate into meaningless exercises in bureaucratic rubber-stamping of boiler-plate rulings. In some instances, of course, the diligent regulator may choose one of the procedures advocated by complaint counsel, i.e., a public hearing, as the appropriate response to a particular regulatory problem. To take one example, in *Southern Motor Carriers*, the Fifth Circuit was obviously impressed by just such a showing ("the record evidence that the commissions routinely suspend the effectiveness of proposed tariffs and conduct hearings satisfies us that the second prong of the *Midcal* test has been met." 672 F.2d at 474, n.5) but the conscientious insurance commissioner might have chosen just as readily some alternative way of determining the reasonableness of rates.

That *Parker* put the state's choice of procedure beyond the scope of federal review does not translate, as respondents argue, into a requirement that there be a docile acceptance of any regime that the states may set up as long as there exists an impressive array of latent supervisory power. Rather, what *Midcal* says is that in the context of an application for a federal antitrust exemption, the proper function of a court or administrative agency is to look at the state's regulatory machinery and make a determination as to whether there was, in fact, a review, monitoring, and an examination of critical aspects of the rate-making process. At trial what this comes down to is that since the "state action" exemption is a matter of affirmative defense, the initial burden rests with respondents to come forward with evidence showing that the state has a regulatory system that is capable, at least on its face, of examining critical aspects of the rate making process. Once this capability is demonstrated, I believe that the burden then shifts to the government which has to prove that in actual practice the regulators did not make such an examination with respect to some crucial aspect of rate making. This allocation of proof is grounded on the assumption of official regularity and the concomitant notion that respondents should have no burden of proving that state officials do what they are supposed to do under their own statutes. Or to put it somewhat differently, if the claim is made that a facially plausible supervisory regime is demonstrably inadequate then the burden to prove this should be on the party—complaint counsel here—challenging state supervision. Such a challenge, however, should not be allowed to lapse over into a qualitative evaluation of the performance of state officials—for example, whether they put enough time or effort into reviewing a particular rate submission—since an inquiry along these lines would not only be contrary to the public policy

expressed in *Parker* of due deference to state sovereignty, but from a practical standpoint "[t]here simply is no way to tell if the state has 'looked' hard enough at the data." I P. Areeda & D. Turner, *Antitrust Law*, ¶ 213c, p. 75 (1978).[287] On the other hand, *Midcal* would have no meaning at all if the exemption were granted when the regulatory machinery is patently inadequate on its face, or when the evidence is incontrovertible, say, an acknowledgment by the state itself that its latent powers are simply not being used (or cannot be used) to review, monitor, and examine crucial aspects of rate making.[288]

[287] See also *Ferguson v. Skrupa*, 372 U.S. 726 (1963) for requirement of similar federal restraint before invoking the Due Process Clause to second-guess the economic programs adopted by state legislatures.

[288] Post-*Midcal* cases have allowed the exemption when the regulatory agency had broad regulatory powers and there was evidence the powers were used. The exemption has been denied notwithstanding the presence of latent regulatory power when the record revealed that the powers were not used. *Compare Capital Telephone Co. v. N.Y. Telephone Co.*, 750 F.2d 1154 (2d Cir.), *cert. denied*, 105 S. Ct. 2325 (1985) (active supervision found where Public Service Commission not only had broad latent powers to supervise telephone companies through hearings and examination of books, but also actually used the powers to investigate rates) *with State of N.C. Ex Rel. Edmisten v. P.I.A. Ashville*, 740 F.2d 274 (4th Cir.), *cert. denied*, 105 S. Ct. 1865 (1985) (finding of no active supervision on a record showing that although the state's grant of a certificate of need for a hospital acquisition was based on extensive review of the application, and the certificate could be revoked for failure to satisfy the conditions on which it was granted, the state did not monitor post-acquisition prices). *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir.), *cert. denied*, 105 S. Ct. 3501 (1985), and *Patrick v. Burget*, 5 Trade Reg. Rep. (CCH) ¶ 67,299 (9th Cir. Sept. 30, 1986) (represent the deference (grounded on concern for the quality of medical care) extended to state authorized peer review of doctors. This special treatment for the professions, which was suggested in *Goldfarb v. Virginia State Bar*,

Applying the standard outlined above to the six states in question, the record shows that in Idaho, there is a specific requirement for prior approval of rates which at least creates a presumption that there had been a scrutiny of bureau filings. I would not second-guess the intensity of that scrutiny when there is no evidence that any aspect of rate making, including insurer expenses, was excluded from that review.

In Arizona, where no major increase in search and examination rates was even proposed during the entire life of the Arizona Rating Bureau, again I do not believe there are adequate grounds for questioning state supervision, notwithstanding Arizona's apparent willingness to accept with little or no justification (under its "deemer" statute) prevailing rates that were simply adopted by the rating bureau. The record shows that the state was involved in what it considered to be a more immediate problem – the rating bureau's attempt to raise and then engraft jointly set escrow fees onto the existing rate structure – and it is unseemly for a federal agency to second-guess Arizona's supervision priorities when the federal government's own investigation of title insurance in Arizona in 1980 zeroed in on escrow rates.

Ohio, of course, is a special problem: complaint counsel simply failed to prove that the rate schedule filed by the Ohio Rating Bureau resulted in uniform charges for search and examination and settlement, as alleged in the complaint.

421 U.S. 773, 788-89, n.17 ("[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently"), has no application to fixing the price for a commonplace commercial service such as the search and examination of real estate title. *Id.* at 787.

In Montana, Connecticut, and Wisconsin the states have adopted "file and use" or "use and file" statutes that reflect a basic policy of diminishing the role of state regulators in favor of reliance on competition as the market regulator. At the same time, these three states have authorized rating bureaus on the assumption that contrary to their basic policy of relying on the market to discipline sellers, the rating bureaus, as a medium for non-competitive, collective action by the insurers, will be closely scrutinized. The issue in these states then is whether there was a critical examination of the crucial aspects of joint rate making, a scrutiny which is inherent not only in the states' own regulatory policies, but also in the "active supervision" standard of *Midcal*.

In Montana, where there has been a history of state involvement in the controlled business and agent commission problems (culminating in specific legislation giving the insurance commissioner authority to review and reject excessive commissions), there is inadequate basis on this record for questioning state supervision during the brief existence of the rating bureau.

As for Connecticut and Wisconsin, there is no need to dwell on the likelihood that because of complaint counsel's obsession with notice, hearing, and a written decision, their attention may have been diverted away from showing during their own case-in-chief that the regulatory scheme was an empty shell. Respondents' defense witnesses—the state insurance officials—readily identified aspects of joint rate making that they themselves considered crucial but which clearly were not being supervised at all. Thus the record shows that in Connecticut jointly fixed rate increases were filed with generalized justifications relating mainly to the profits of the insurers. The rates were "deemed" effective after a brief period because the state had taken no action. At most, during the "deemer" period,

the state merely reviewed for accuracy what the rating bureau gave it in the way of insurance company profitability. There was no critical examination whatever of what lay behind those profit figures. Most significantly, there was no showing that Connecticut even had the wherewithal to probe into the critical area of insurer expenses, especially the impact on the level of rates of the so-called agent retention or "commission" expense and the cozy relationship between insurers and attorney-agents that fuels this expense. In other words, even though the Connecticut Insurance Department was convinced of the overriding contribution of the agent commission factor in increasing the cost of title insurance to consumers, it believed that it was statutorily barred from doing anything about it, and indeed that it would take new legislation for it even to acquire the power to look behind the reported insurer expenses. Thus by the state's own account (and irrespective of the broad array of latent powers it possessed in the insurance field or the elaborate supervisory regime it had established), it cannot and did not, review, monitor, or examine in any meaningful sense the very factor that its insurance regulators had identified as crucial in rate making.

Similarly, Wisconsin followed a hands-off policy in dealing with title insurers. And again, it was a state official called by respondents who readily acknowledged that insurer expenses were simply not examined although the state recognized how critical these expenses were in rate making.

It must be emphasized that to require that these two states put into place and use a means for examining crucial aspects of joint rate making does not impose an onerous burden on them. Basic rates are not changed that often in the title insurance business, and I am not suggesting that a state may not adopt a sampling approach whereby only

across-the-board rate increases rather than adjustments or special endorsements are closely examined. But when the states themselves have identified a critical area, such as the agent retention expense, there must be a showing that the problem was addressed either before rates were increased or at least sometime during the period between major rate increases. And while I would also allow the states practically unlimited flexibility in how they chose to approach the problem, the point is that there is no proof in this record that these two states have taken any steps to deal with the agent-insurer relationship, or for that matter any other expense element factor impacting on title insurance rates.

Of course if the two states choose not to supervise actively by establishing and using a mechanism for scrutinizing the rate making process and especially the crucial expense component of that process, there is no federal requirement that they do so. But then insurers in those states should not be asking for a federal antitrust exemption, and instead the market should be allowed to accomplish what the states are either unwilling to do or are only willing to cover over with the "gauzy cloak" of supervision that *Midcal* says is not acceptable.

Settlement Services

The record fully supports the conclusion reached by the United States District Court For The District of Arizona and the Ninth Circuit in *TIRBA* that settlement or escrow services are clearly not the "business of insurance." However, in the only states where respondents, through title insurance rating bureaus, were allegedly fixing settlement or escrow rates, and the issue is properly before the Commission,[289] the complaint allegations cannot be sustained. In

[289] As indicated in Finding 186, the issue of settlement services in Arizona is not properly before the Federal Trade Commission.

Pennsylvania and New Jersey, where the rating bureau activity concededly was actively supervised by the states, the *Parker* exemption applies to search and examination as well as settlement services since the states authorized the alleged illegal joint activity relating to attorney-agents. In Ohio and Connecticut, there was a failure of proof that either the "risk" rates or the inclusive rates set in those states by the rating bureaus resulted in uniform settlement fees.

Noerr-Pennington

In addition to a claim of immunized state action, respondents have argued that their joint rate making consists of nothing more than "petitioning" of a state agency which is protected by the *Noerr-Pennington* doctrine. In *Eastern R. Conf. v. Noerr Motors,* 365 U.S. 127 (1961), *Mine Workers v. Pennington,* 381 U.S. 657 (1965), and *California Transport v. Trucking Unlimited,* 404 U.S. 508 (1972) the Supreme Court held that political advocacy—broadly interpreted as attempts to influence the legislature, the executive, or an administrative agency in the making of policy—was protected under the First Amendment right to petition as well as the public policy of encouraging the free flow of ideas to policy makers. To argue, as respondents do, that the joint fixing of rates by competitors somehow interferes with their right of political advocacy, is analogous to saying that contractors should be allowed to conspire to rig bids on government projects so long as the results of the conspiracy are wrapped in the trappings of a "petition" or proposal which may be said to convey policy information to official decision-makers. Nothing said before or after *Noerr, Pennington,* or *California Transport* allows for such a distortion of the concept of political advocacy, and the Supreme

Court, the lower courts, and the Commission have emphatically rejected similar attempts at such a misuse of the doctrine. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976); *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 409, 476-77 (5th Cir.), *rev'd on other grounds*, 105 S.Ct. 1721 (1985); *TIRBA*, 517 F. Supp. 1053, 1059-60 (D. Ariz.), *aff'd*, 700 F.2d 1247 (9th Cir.), *cert. denied*, 104 S. Ct. 3509 (1984); *Mass. Movers*, 102 F.T.C. 1176, 1222-24, *rev'd and remanded on other grounds*, 773 F.2d 391 (1st Cir. 1985).

Rule Of Reason

The Commission held in *Mass. Movers*, 102 F.T.C. at 1224, that if there were no state action exemption, the collective rate making activities of a rating bureau are not governed by the rule of reason because "it is clear beyond cavil that agreements among competitors to set price levels or private ranges are *per se* illegal under the antitrust laws. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940); *see also Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed. 2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*)."

Commerce

The search and examination and settlement services offered by respondents are part and parcel of the interstate sale and financing of real estate. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Mootness

There can be no mootness defense in this case since respondents insist that search and examination services, as

part of the "business of insurance," are beyond the jurisdictional reach of the Commission, and they reserve the right to rejoin rating bureaus whenever they desire to fix collectively the rates for these services. In short, none of the conditions for preventing any future violation would be eliminated unless an order is issued. On this basis alone, this case is diametrically opposite to these instances (*see, e.g., United States v. W.T. Grant*, 345 U.S. 629 (1953); *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984)) in which the abandonment or mootness defenses were given limited recognition.

Scope of The Order

Complaint counsel insist that they are entitled to an "all-states" order although it is obvious that it takes a state-by-state analysis to determine where the *Parker* defense applies. Complaint counsel's argument that they are entitled to a broad order is unpersuasive considering the fact that the complaint cites respondents' activities in only 13 states and complaint counsel's post-complaint investigation apparently revealed that the state action defense would probably prevail in at least seven of those states. As complaint counsel would now have it, an order should be entered, which not only would retrieve the seven states they themselves dropped from the case, but also would add 37 more that were never in the case to begin with. Not only is an "all-states" order unsupportable, but on a record in which there is not a hint of any collusive rate making activity outside of the rating bureaus, a broad order covering all other possible forms of illegal combination cannot be justified.

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction in this matter because respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Providing search and examination services and settlement services is not the "business of insurance" as that term is used in the McCarran-Ferguson Act.

3. Respondents combined to fix the rate for search and examination services in the states of Connecticut, Wisconsin, Arizona, Idaho, and Montana.

4. The joint fixing of the rates for search and examination services described in Paragraph 3 above, while authorized by the aforementioned states, was not actively supervised in Connecticut and Wisconsin.

5. Respondents joint rate making activity respecting search and examination services and settlement or escrow services performed by attorney-agents in Pennsylvania and New Jersey was authorized by the states.

6. There was a failure of proof that respondents have fixed uniform search and examination and settlement or escrow charges in Ohio.

7. There was failure of proof that respondents have fixed uniform settlement or escrow charges in Connecticut.

8. The issue of joint rate making activity by respondents respecting settlement or escrow charges in Arizona is not properly before the Commission.

Accordingly, the following order should be issued:

ORDER

I

For the purposes of this Order, "Search and examination services" means all activities which are designed to identify and describe the ownership of a particular parcel of real property as well as any other actual or potential rights to, encumbrances on, or interests in the property.

II

IT IS ORDERED that respondents, their successor and assigns, and their officers, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device shall cease and desist in Connecticut and Wisconsin from discussing, proposing, setting, or filing any rates for title search and examination services through a rating bureau.

III

IT IS FURTHER ORDERED that respondents shall within thirty days after service of this ORDER deliver a copy of this Order to all their present officers, directors, and personnel having any responsibility in determining rates as well as to the state insurance departments in Connecticut and Wisconsin.

IV

IT IS FURTHER ORDERED that respondents notify the Commission at least thirty days prior to any change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this Order.

V

IT IS FURTHER ORDERED that respondents shall, within ninety days after the Order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

/s/ Morton Needelman
MORTON NEEDELMAN
Administrative Law Judge

DATED: December 22, 1986

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—282-061/20609